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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901. 1902.

No. 248. 45.

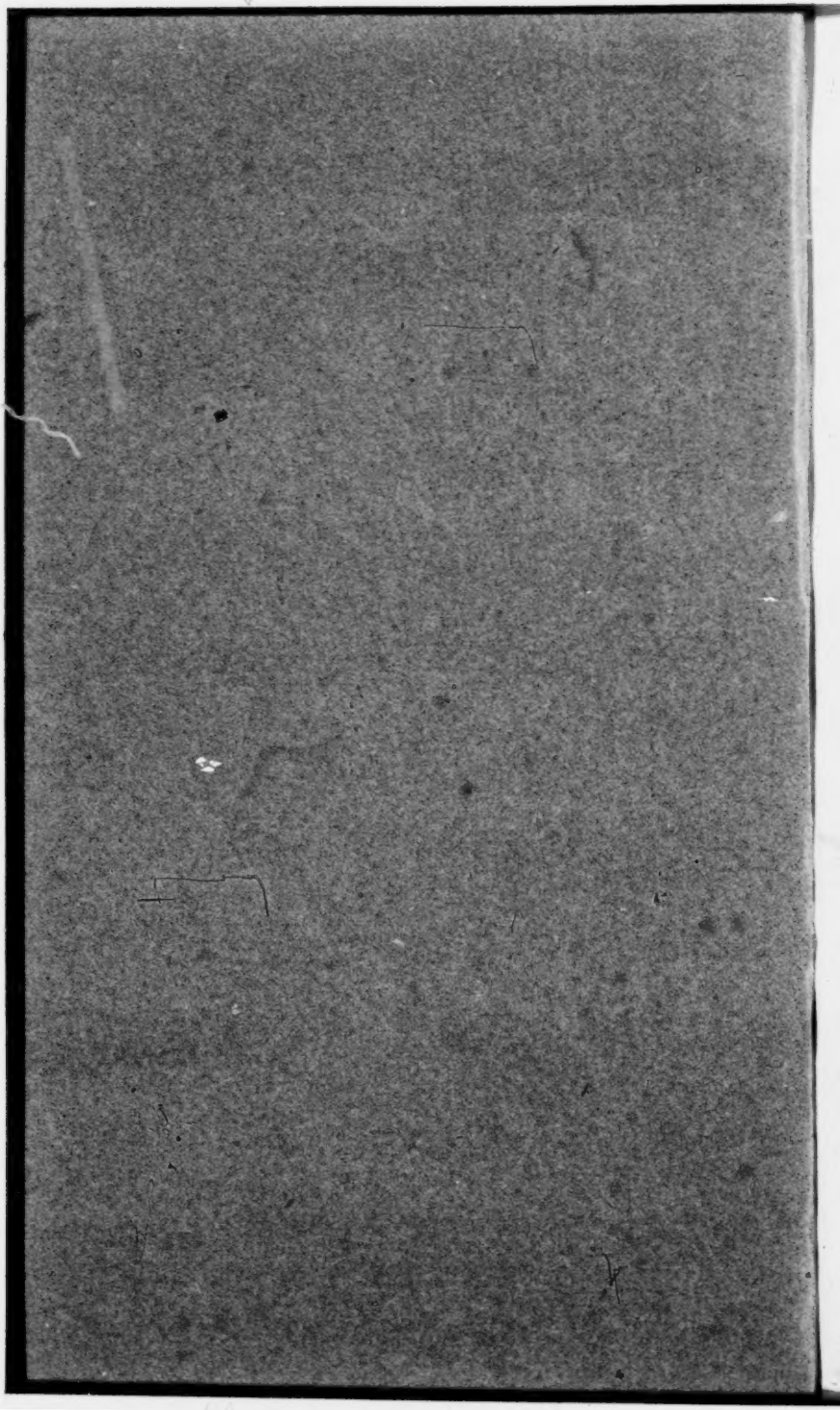
THE UNITED STATES, APPELLANT,

vs.

ARTHUR LYNAH ET AL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA.

FILED FEBRUARY 7, 1901.
(19,063.)



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1 *Transcript of record.*

CAPTION.

The United States of America, district of South Carolina. In the circuit court, fourth circuit. To wit:

At a circuit court of the United States for the fourth circuit, in and for the district aforesaid, on the fourth Tuesday in November, 1899, before the Honorable Charles H. Simonton, circuit judge of the United States for the fourth judicial circuit, holding said court according to the form of the act of Congress in such case made and provided, the following proceedings were had:

ARTHUR LYNAH, J. H. LYNAH, EDWARD LYNAH, James Lynah, Emma P. Lynah, Jane L. Lynah, Susan N. Lynah, Kate McD. Cunningham (born Lynah), Marie Glover Jenkins (born Lynah), Annie McD. Hopkins (born Lynah), plaintiffs, petitioners,

vs.

THE UNITED STATES, DEFENDANT.

Be it remembered that heretofore, to wit, on the 4th day of February, 1897, came into court the said plaintiffs, petitioners, by their attorneys, Messrs. Bryan & Bryan, and filed their petition and complaint, which petition and complaint is in the words and tenor following:

2 *Petition and complaint.*

United States of America, district of South Carolina. Circuit court, fourth circuit.

ARTHUR LYNAH, J. H. LYNAH, EDWARD LYNAH, James Lynah, Emma P. Lynah, Jane L. Lynah, Susan N. Lynah, Kate McD. Cunningham (born Lynah), Marie Glover Jenkins (born Lynah), Annie McD. Hopkins (born Lynah), plaintiffs, petitioners,

against

UNITED STATES, DEFENDANT.

To the Circuit Court of the United States for the District of South Carolina:

The petition and complaint of plaintiffs above named, complaining against the United States, respectfully shows and alleges:

First. That the plaintiffs, your petitioners, are citizens of the United States, and reside as follows: Plaintiffs Arthur Lynah, J. H. Lynah, Edward Lynah, Emma P. Lynah, Jane L. Lynah, Susan N. Lynah, now reside in State and district of South Carolina; plaintiff James Lynah resides in the State of Maryland; plaintiffs Marie Glover Jenkins (born Lynah), and Kate McD. Cunningham (born Lynah), and Annie McD. Hopkins (born Lynah) reside in the State of Georgia.

Second. That your petitioners have a claim against the United
3 States of America under an implied contract for compensation for the value of property taken by the United States for public use, as hereinafter stated and alleged.

Third. That your petitioners were at the times hereinafter mentioned, and now are, owners as tenants in common of a certain plantation situated in the county of Beaufort, State of South Carolina, described as follows:

"All that plantation or tract of land called Vernezobre, situate, lying, and being on the Savannah River, in Saint Peters parish, Beaufort district, and State aforesaid, butting and bounding to the north on land of the late John M. Chisolm and Elliott Guerard; to the east on lands formerly of Brisbane; to the west on Savannah River, lands of Elliott Guerard and Daniel Heyward, esq.; to the south on lands of Daniel Heyward, Elliott Guerard, and Pringle Smith, esqs., measuring and containing two thousand one hundred (2,100) acres, more or less." A certain tract or parcel of which said plantation, containing four hundred and twenty (420) acres, more or less, which is delineated on a map of said plantation and enclosed within red lines, hereto annexed and made part of this complaint, has been for seventy years and upwards a rice plantation on the Savannah Back River, with great labor and expenditure of money reclaimed and established and maintained as a plantation solely for the cultivation of rice, adapted thereto by the level of the lands thereof in relation to the natural level of the waters of the said Savannah River, and depending for its proper drainage and cultivation upon the maintenance of the natural flow of the said Savannah River in, through, and over its natural channel along its natural bed to the waters of the Atlantic Ocean.

Fourth. That for several years continuously, and now contin-
4 uously, the said Government of the United States of America, in the exercise of its power of eminent domain under the Constitution of the United States and by authority of the acts of Congress, duly empowering its officers and agents thereto, in that case made and provided, did erect, build, and maintain, and continuously since have been erecting, building, and maintaining, and are now building, erecting, and maintaining in and across the said Savannah River, in the bed of the said Savannah River, certain dams, training walls, and other obstructions, obstructing and hindering the natural flow of the said Savannah River through, in, and along the natural bed thereof and raising the said Savannah River feet at the point of and above the said obstructions and dams in the bed of the said Savannah River, and causing the said waters of the Savannah River aforesaid to be kept back and to flow back and to be raised and elevated above the natural height of the Savannah River along its natural bed at the points of the said dams, training walls, and obstructions, and at points above the said dams, training walls, and obstructions in said river.

Fifth. That the said dams, training walls, and obstructions have been and are being erected and maintained in the bed of said river at a great height at divers places in said river, below the said plantation of your petitioner'.

Sixth. That the effect of the said dams, training walls, and obstructions in said Savannah River upon the said four hundred and twenty acres,

being the rice lands, portions of the said plantation of your petitioners, commonly known as "Verzenobre," is that it backs the waters of the Savannah River in and upon the said plantation, and it raises and forces back the waters of the Savannah River at, in, and around and upon the said plantation to the height of about two feet over and above the
5 natural and ordinary level of the said Savannah River, existing at, in, and around the said plantation at the time of its establishment as a rice plantation and previous to the erection and maintenance of the said obstructions, training walls, and dams by the United States, and thus preventing the natural outflow of water from the said plantation necessary for the purpose of drainage and cultivation of said four hundred and twenty (420) acres, lands of said plantation, and preventing the established and proper inflow and outflow of the waters of the Savannah River necessary to the cultivation of the said four hundred and twenty (420) acres of lands of said plantation as a rice plantation, and further filling the ditches and saturating the lands with water and preventing the outflow of water from the said "Verzenobre" plantation and submerging and destroying the crops of and preventing the drainage of the said four hundred and twenty (420) acres of lands of said plantation for cultivation for any purpose whatsoever, and that by the said superinduced additions of water actually invading the said rice lands of said plantation, the said four hundred and twenty (420) acres of said plantation is permanently injured and effectually destroyed.

Seventh. And your petitioners further show that the said acts of the Government of the United States, as aforesaid, have been done and are being done lawfully by the officers and agents of the United States under the authority of the United States in the exercise of its powers of eminent domain and regulation of commerce under the Constitution of the United States and the laws of Congress for the public purpose of the improvement of the harbor of Savannah and deepening the waters of the Savannah River at the port of Savannah, a port of entry of the United States and seaport of the United States of America, situated within the
6 State of Georgia, on the Savannah River, and with the purpose of deepening and enlarging the navigable channel and highway for commerce of the said Savannah River for the public use, purpose, and benefit of interstate and foreign and international trade and commerce, and for other public purposes, uses, and benefits.

Eighth. The plaintiffs, petitioners, further show and allege that by reason of the premises there is due and owing unto the plaintiffs, petitioners, by the United States for and in consideration of the facts hereinbefore alleged and the taking by the United States of the said four hundred and twenty acres, as aforesaid, of the said plantation for public uses and purposes, as in the manner and form heretofore alleged, the sum of ten thousand dollars ($10,000), the value of and lawful compensation for such property so taken as aforesaid.

Wherefore the plaintiffs, petitioners, pray judgment against the United States of America for the sum of ten thousand dollars ($10,000).

(Signed) BRYAN & BRYAN,
Attorneys of Plaintiffs, Petitioners, 11 Broad st., Charleston, S. C.

UNITED STATES OF AMERICA,
District of South Carolina:

Personally appeared Arthur Lynah, one of the plaintiffs, petitioners, herein and makes oath that the matters and things set forth and stated in the above complaint and petition are true to his own knowledge.

(Signed) ARTHUR LYNAH.

Sworn to before me this 30 day of January, 1897.

[SEAL.] (Signed) ARTHUR BRYAN,
Notary Public for S. C.

Filed Feby. 4, 1897.

(Here follows diagram marked p. 7.)

8 *Marshal's return of service.*

United States of America, district of South Carolina. Circuit court, fourth circuit.

ARTHUR LYNAH, J. H. LYNAH, EDWARD LYNAH, James Lynah, Emma P. Lynah, Jane L. Lynah, Susan N. Lynah, Kate McD. Cunningham (born Lynah), Marie Glover Jenkins (born Lynah), Annie McD. Hopkins (born Lynah), plaintiffs, petitioners,
against
UNITED STATES, DEFENDANT.

Petition and complaint. Filed 4 February, 1897.

Affidavit of service.

Personally appeared H. J. Hickson, office dep. marshal U. S., district South Carolina, and makes oath that he served the above petition and complaint on Hon. W. Perry Murphey, district attorney of the United States for the district of South Carolina, by leaving a certified copy of the same with him, at the office of the U. S. district attorney, Charleston, S. C., on the 4th day of February, 1897, and deponent is not a party to or interested in the result of this action.

Deponent further makes oath that he mailed a certified copy of the said petition and complaint by registered letter to the Hon. Judson Harmon, Attorney-General of the United States, by depositing the same, enclosed in an envelope, in the post-office at Charleston, S. C., on the 4th day of February, 1897, addressed "Hon. Judson Harmon, Attorney-General of the United States, Washington, D. C.," postage prepaid.

(Signed) H. J. HICKSON,
Office Deputy U. S. Marshal.

9 Sworn to before me this 4th day of February, 1897.

[SEAL.] C. J. MURPHY,
Dpty. C. C. C. U. S., Dist. S. C.

Filed Feby. 4, 1897.

10 *Answer.*

The United States of America, district of South Carolina, fourth circuit.
In the circuit court.

ARTHUR LYNAH, J. H. LYNAH, EDWARD LYNAH, James Lynah, Emma P. Lynah, Jane L. Lynah, Susan N. Lynah, Kate McD. Cunningham (born Lynah), Marie Glover Jenkins (born Lynah), Kate McD. Hopkins (born Lynah), plaintiffs, petitioners,
against
THE UNITED STATES, DEFENDANT.

The defendant, by Abial Lathrop, United States attorney for the district of South Carolina, answering the petition and complaint herein, alleges,

For a first defence to the alleged cause of action:

First. That this defendant has no knowledge or information sufficient to form a belief as to the truth of the allegations contained in the first and third paragraphs of the said petition and complaint.

Second. That this defendant denies all of the allegations contained in the second, fourth, fifth, sixth, seventh, and eighth paragraphs of the said petition and complaint except so much of the fourth paragraph as alleges that the said United States heretofore erected certain dams in the Savannah River pursuant to power vested in it by law, and except so much of the seventh paragraph as alleges that the said dams heretofore erected by the United States were lawfully erected by its officers and agents.

For a second defence to the alleged cause of action:

That the said alleged cause of action did not accrue within six years before the commencement of this action.

11 Wherefore this defendant prays judgment that the said petition and complaint be dismissed, and for the costs of this action.

(Signed) ABIAL LATHROP,
U. S. Attorney, Defendant's Attorney.

UNITED STATES OF AMERICA,
District of South Carolina:

Personally appeared before me Abial Lathrop, United States attorney, and made oath that the above and foregoing answer is true of his own knowledge.

ABIAL LATHROP.

Sworn to before me this 20th day of August, 1897.

[L. S.] ROBERT LIDE,
U. S. Commissioner.

12 Service acknowledged 21 August, 1897.

BRYAN & BRYAN,
Attys. Plaintiffs, Pets.

Marshal's return of service.

Paul Moore, office deputy U. S. marshal, being duly sworn, says that he served a copy of within answer personally on J. P. K. Bryan, esq., of

the firm of Bryan & Bryan, attorneys at law, at Charleston, S. C., on the 21st day of August, 1897.

PAUL MOORE,
Office Deputy U. S. M.

Sworn to before me Aug. 21, 1897.

C. J. C. HUTSON,
Clerk U. S. D. C., S. C.

Filed Aug. 21, 1897.

13 *Trial of cause.*

At a stated term of the circuit court begun and holden at Columbia, S. C., on the fourth Tuesday in November, 1899, and adjourned to Charleston, S. C., on the 24th day of January, 1900, this case came up for trial before the court, upon the testimony, proofs, and pleadings, and after hearing the same and the arguments of counsel, the court took the case under advisement.

And thereafter, to wit, on the 8th day of August, 1900, the court filed the following findings of fact and conclusions of law:

14 *Findings of fact and conclusions of law.*

The United States of America, district of South Carolina. In the circuit court, fourth circuit. At law.

ARTHUR LYNAH, J. H. LYNAH, EDWARD LYNAH, James Lynah, Emma P. Lynah, Jane L. Lynah, Susan N. Lynah, Kate McD. Cunningham (born Lynah), Marie Glover Jenkins (born Lynah), Annie McD. Hopkins (born Lynah), plaintiffs, petitioners,
vs.
THE UNITED STATES, DEFENDANT.

This is a proceeding under the act of Congress, March 3, 1887, giving this court coordinate jurisdiction with the Court of Claims in certain causes of action against the United States. The object of the proceedings is to obtain just compensation for certain lands alleged to have been taken by the Government for public purposes. The cause of action is on the implied contract arising from such alleged taking to give just compensation therefor, under the fifth amendment.

The cause being at issue was tried by the court, in accordance with the act of Congress, without the aid of a jury.

FINDINGS OF FACT.

I. The above petition was in compliance with the requirements of act of March 3rd, 1887, chapter 359, duly filed in the clerk's office, circuit court of the United States for the district of South Carolina, on
15 the 4th day of February, 1897, and copies thereof duly served on the United States district attorney and the Attorney-General of the United States, and said law in all respects complied with.

II. The plaintiffs, Arthur Lynah, J. H. Lynah, Edward Lynah, James Lynah, Emma P. Lynah, Jane L. Lynah, Susan M. Lynah, Kate McD.

Cunningham, Marie Glover Jenkins, Annie McD. Hopkins, are the children and sole heirs at law and distributees of Edward Lynah, deceased.

III. Edward Lynah, the father of the plaintiffs, at the time of his death, and for many years previous thereto, was the owner in fee simple of a plantation on Savannah River, in the State of South Carolina, known as Vernezobre, containing about 2,100 acres of high land and rice land. He held this plantation under sundry successive mesne conveyances connecting his title with a grant of the said land by the lords proprietors of South Carolina in 1736.

IV. A certain parcel of this plantation, measuring about 420 acres, had been reclaimed by drainage and had been in actual continued use for seventy years and upwards as a rice plantation, used solely for this purpose. This rice plantation was dependent for its irrigation upon the waters of the Savannah River and its ditches, drains, and canals, through and by which the waterf of the river were flowed in and upon the lands, and were then drained therefrom, were adapted to the natural level of the said Savannah River, and dependent for their proper drainage and cultivation upon the maintenance of the natural flow of the said river in, through, and over its natural channel along its natural bed to the waters of the ocean.

V. This portion of the plantation dedicated to the culture of rice was protected from the river by an embankment. Through this embankment trunks or waterways were constructed, with flood gates therein.

The outer opening of the trunk was about a foot or a little less
16 above the mean low-water mark of the river, in which the tide ebbs and flows. When it is desired to flow the lands the flood gates are opened and the water comes in. When it is desired to draw off this water and to effect the drainage of the lands, the flood gates are opened at low water and the water escapes. It is essential that the outlet of the trunks or waterways should always be above the mean low-water mark.

VI. These lands were granted by the lord proprietors of Carolina in 1736, and lie on the Savannah Back River, a tidal fresh-water stream, and are adapted by relation to their level of the cultivation of rice, under the natural flow of the Savannah River along its natural bed to the sea. The whole rice culture of South Carolina is founded upon this system, and the policy of the colony and the State has been to grant such lands for rice culture; and, inasmuch as it is necessary to have the lands absolutely dry to prepare the same for planting and to plant the rice crop, which is afterwards flowed while the rice is growing, and again dry while the rice is being harvested, the State has, by severe penal laws, for one hundred and fifty years protected such rice lands from destruction by continual inundation by backing up water or keeping surplus water on the lands by stopping the course of any water in its natural flow. (Revised Statutes of South Carolina, secs. 1264 to 1267.)

It appears from the plats among the muniments of plaintiffs' title that these rice lands were reclaimed and enclosed and in a state of culture one hundred and twenty years ago, and probably longer.

VII. For several years last past and at the present time the Government of the United States, under its proper officers, authorized thereto by act of Congress, have been engaged in the improvement of the navigation of the Savannah River, a navigable water of the United States, this

improvement being carried on by virtue of the provisions of section 8, Article I, of the Constitution, giving to the Congress the power to regulate commerce.

17 VIII. In thus improving navigation of this navigable water the United States has built and maintained and is now building and maintaining in and across the Savannah River, in the bed thereof, certain dams, training walls, and other obstructions, obstructing the natural flow of said river in and along its natural bed, and so raising the level of said river above said obstructions and causing its waters to be kept back and to flow back and to be elevated above its natural height in its natural bed.

IX. This rice plantation Vernezobre is above these obstructions. The direct effect thereof is to raise the level of the Savannah River at this plantation and to keep the point of mean low water above its natural point, so that the outlet of the trunks and waterways above spoken of in the bank of said plantation, instead of being above this point of low-water mark, is now below this point. Another direct result was that by seepage and percolation the water rose in the plantation until the water level in the land gradually rose to the height of the increased water level in the river, and the superinduced addition of water in the plantation was about eighteen inches thereby. By reason of this it gradually became difficult and has now become impossible to let off the water on this plantation or to drain the same, so that these acres dedicated to the culture of rice have become boggy, unfit for cultivation, and impossible to be cultivated in rice.

X. By the raising of the level of the Savannah River by these dams and obstructions the water thereof has been backed up against the embankment on the river and has been caused to flow back upon and in this plantation above the obstruction, and has actually invaded said plantation, directly raising the water in said plantation about eighteen inches, which it is impossible to remove from said plantation. This flooding is the permanent condition now, and the rice plantation is

18 thereby practically destroyed for the purpose of rice culture or any other known agriculture, and is an irreclaimable bog and has no value.

XI. By reason of this superinduced addition of water actually invading the said rice plantation and its destruction thereby for all purposes of agriculture, plaintiffs have been compelled to abandon the cultivation of said rice plantation and have been forced to pursue their calling of planting rice on other plantations below the dams. The direct result to plaintiffs is an actual and practical ouster of possession from this rice plantation, cultivated by themselves and family for many years.

XII. Beyond the backing up of the water on and in the plantation by reason of the dams and obstruction, and the invasion of these lands by this superinduced addition of water at and in the plantation as above described, rendered necessary by the execution of the Government's plans, the United States is not in actual possession of these lands.

XIII. Up to this time no other use has been discovered for these lands than for rice culture, and the direct results above stated have totally destroyed the market value of the lands. They now have no value.

XIV. The value of these rice lands before the obstructions aforesaid

were put into the river was about thirty dollars per acre—between twenty-five and thirty dollars per acre. The value of the rice plantation, 420 acres, thus destroyed is ten thousand dollars.

XV. The dams and obstructions built in Savannah River by the Government of the United States were for several years being continuously erected, the height of the water gradually being increased and the injury to the plantation gradually progressing, destroying its cultivation in successive fields. Its greatest height was reached about 1895, and within six years of the commencement of this action. The gradual
19 effect of the dams and obstructions and jetties did not result in a final condition of complete destruction and an enforced abandonment of this rice plantation and practical and actual ouster of plaintiffs until 1895, and within six years of the commencement of this action.

CONCLUSIONS OF LAW.

I. The cause of action accrued within six years of the commencement of this action.

II. The Government of the United States, in undertaking this improvement of the navigation of the Savannah River, was and is exercising its lawful power in its right to regulate commerce, subject to the fifth amendment. (Monongahela N. Co. vs. U. S., 148 U. S., 336–7.)

III. Every riparian proprietor whose lands lie on a navigable water of the United States holds these lands with notice that the Government has the right to improve the navigation in such a mode as it deems most advisable.

IV. If, therefore, such riparian proprietor suffer damage incidental to or consequential upon such improvement, he can not under any circumstances treat the Government as a trespasser or tort feasor; and can not, under the fifth amendment, demand compensation, unless there is an actual physical invasion of and taking of his land for the public purpose—a physical invasion of the real estate of the private owner and a practical ouster of his possession. (Gibson vs. The U. S., 166 U. S., 269.)

V. The crucial question in this case is, Was there a taking of this land in the sense of the Constitution?

The facts found show that by reason of the obstruction in the Savannah River the water has been directly backed up against the embankment on the river and the banks on and in this plantation, the superinduced addition of water actually invading it and destroying its drainage and leaving it useless for all practical purposes. The Government does not in a sense take this land for the purpose of putting its obstructions
20 on it. But it forces back the water of the river on the land as a result necessary to its purpose, without which its purpose could not be accomplished. For the purpose of the Government that water in the river must be raised. The banks of this plantation materially assist this operation, for by their resistance the water is kept in the channel. The backing up of the water against the banks to create this resistance raises the water in the plantation and destroys the drainage of the plantation. This is a taking. "It would," says Mr. Justice Miller, "be a very curious and unsatisfactory result if, in construing a provision of constitutional law, always understood to have been adopted for

protection and security to the rights of the individual as against the Government and which had received the commendation of jurists, statesmen, and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the Government refrains from the absolute conversion of real property to the uses of the public, it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject to total destruction without making any compensation, because in the narrowest sense of that word it has not been taken for the public use." Pumpelly vs. Green Bay Co., 13 Wall., 177, 178. In that case the backing up of water on land was held to be a taking.

VI. The plantation of plaintiffs being actually invaded by superinduced addition of water directly caused by the Government dams and obstructions backing up the water of the Savannah River and raising the water level at and in the rice plantation and making it unfit for rice cultivation or for any other known agriculture, and plaintiffs having been compelled thereby to abandon the plantation, and this actual and practical ouster of possession being continued and permanent by reason
21 of the permanent condition of the flooding of the plantation, and the plantation being thereby now an irreclaimable bog of no value, makes the action of the Government a taking of lands for public purposes within the meaning of the fifth amendment, for which compensation is due to the plaintiffs. Pumpelly vs. Green Bay Co., 13 Wall., 182; Mugler vs. Kansas, 123 U. S., 668.

VII. The Government has not gone into actual occupancy of this land, but by reason of these dams and obstructions made necessary by this public work and fulfilling its purpose the water in the Savannah River has been raised at the plaintiffs' plantation and has been backed up on it and remains on it so that the drainage has been destroyed and ditches filled up and superadded water permanently kept on the land and forced up into it, making it wholly unfit for cultivation, and the plaintiffs have thereby been practically and actually ousted of their possession. This is taking of the land for public purposes, for which compensation must be provided. Pumpelly vs. Green Bay Co., 13 Wall., 181.

VIII. The plaintiffs are entitled to just compensation for the taking of the 420 acres of rice land. This is estimated to be ten thousand dollars, the value of the land so taken, for which amount let the plaintiffs have judgment.

(Signed) CHARLES H. SIMONTON,
Circuit Judge.

7 Aug., 1900.

Filed Aug. 8, 1900.

22 *Order for judgment.*

Let the plaintiffs have judgment against the defendant for the sum of ten thousand dollars ($10,000.00).

CHARLES H. SIMONTON,
Circuit Judge.

August 7, 1900.
Filed Aug. 8, 1900.

23 *Judgment.*

The United States of America, district of South Carolina. Circuit court, fourth circuit.

ARTHUR LYNAH, J. H. LYNAH, EDWARD LYNAH, James Lynah, Emma P. Lynah, Jane L. Lynah, Susan N. Lynah, Kate McD. Cunningham (born Lynah), Marie Glover Jenkins (born Lynah), Annie McD. Hopkins (born Lynah), plaintiffs, petitioners,

versus

THE UNITED STATES, DEFENDANT.

Judgment by the court.

This action having been brought to a trial before the court and conclusions of facts and of law having been duly found and filed by the court on the eighth day of August, 1900, whereby ten thousand dollars was found to be due to the plaintiffs, Arthur Lynah, J. H. Lynah, Edward Lynah, James Lynah, Emma P. Lynah, Jane L. Lynah, Susan N. Lynah, Kate McD. Cunningham (born Lynah), Marie Glover Jenkins (born Lynah), Annie McD. Hopkins (born Lynah), by the defendant, the United States, and an order to enter judgment accordingly was therein contained,

Now, on motion of Bryan & Bryan, attorneys for said plaintiffs, it is ordered that the said plaintiffs recover of the said United States the sum of ten thousand dollars so found, with fifty-three 40/100 dollars costs.

(Signed) BRYAN & BRYAN,
Petitioner Plaintiffs' Attorneys.

(Signed) J. E. HAGOOD,
C. C. C. U. S., Dist. S. C.

Aug. 9, 1900.
Filed Aug. 9, 1900.

24 *Assignment of errors and petition for writ of error.*

The United States of America, district of South Carolina. In the circuit court, fourth circuit, at law.

ARTHUR LYNAH, J. H. LYNAH, EDWARD LYNAH, James Lynah, Emma P. Lynah, Jane L. Lynah, Susan N. Lynah, Kate McD. Cunningham (born Lynah), Marie Glover Jenkins (born Lynah), Annie McD. Hopkins (born Lynah), plaintiffs, petitioners,

against

THE UNITED STATES, DEFENDANT.

To the Honorable, the Judges of the Circuit Court of the United States for the District of South Carolina:

The defendant, by counsel, respectfully assigns the following errors to the judgment and findings of the presiding judge in this cause:

I.

The court erred in holding that the direct result of the Government works of improvement in the Savannah River is an actual and practical ouster of plaintiffs from their possession of the rice plantation in question.

II.

The court erred in holding as follows: "The facts found show that by reason of the obstruction in the Savannah River the water has been directly backed up against the embankments on the river and the banks on and in this plantation, the superinduced addition of water actually invading it and destroying its drainage and leaving it useless for all practical purposes. The Government does not in a sense take this land for the purpose of putting its obstructions on it. But it forces back the water of the river on the land as a result necessary to its purpose, without which its purpose could not be accomplished. For the purpose of the Government that water in the river must be raised. The banks of this plantation materially assist this operation, for by their resistance the water is kept in the channel. The backing up of the water against the banks to create this resistance raises the water in the plantation and destroys the drainage of the plantation. This is a taking."

III.

The court erred in holding that the erection and maintenance of Government works in the bed of a navigable tidal river, for the improvement of the navigation thereof, whereby the water in said river is backed up against the banks of a rice plantation lying on said river, and destroying the drainage thereof, amounts to a taking of the said plantation for public use.

IV.

The court erred in holding that a riparian owner of rice lands dependent for their irrigation and drainage upon the natural flow of the waters of a tidal river is entitled to compensation by the Government, under the fifth amendment to the Constitution, for damages arising from the construction and maintenance of Government works for the improvement of navigation of said river, erected and maintained wholly within the bed of said river, by which the mean low-water level of said river is raised and the natural drainage of the said lands destroyed.

V.

The court erred in holding that the property of the plaintiffs has been taken by the Government for public use.

VI.

The court erred in holding as follows: "The plaintiffs are entitled to just compensation for the taking of the 420 acres of rice land."

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VII.

That the court erred in holding that the plaintiffs are entitled to recover upon the facts found by the court in this action.

VIII.

The court erred in failing to hold that the intention of the Government in the erection and maintenance of the works of improvement in question was only to improve its own property, and not to acquire the property of another.

IX.

The court erred in failing to hold that plaintiffs' title to the rice land, lying between high and low water on a tidal river, was subservient to the right of the Government to cause the waters of said river to be held back thereon for the benefit of navigation, without compensating the owners for damages resulting therefrom.

X.

The court erred in failing to hold that the damages resulting from the prosecution of this improvement of a navigable highway, for the public good, was not the result of a taking of plaintiffs' property, and was merely incidental to the exercise of a servitude to which the property had always been subject.

XI.

The court erred in failing to hold that the complaint should be dismissed, with costs to the defendant.

27 Wherefore, for these and other errors apparent in the rendition of said judgment, the defendant, by counsel, prays a writ of error to said judgment, that the same may be allowed, and that a transcript of this record and proceedings and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States, sitting at Washington in the District of Columbia.

And, as in duty bound, will ever pray, and so forth.

ABIAL LATHROP,
United States Attorney, Defendant's Attorney.

Service of a copy of the within assignments of error acknowledged by me this 2 day of Feby., 1901.

BRYAN & BRYAN,
Atty. for Petrs.

Filed Feb. 1, 1901.

Order allowing writ of error.

Writ of error allowed.

CHARLES H. SIMONTON,
U. S. Circuit Judge, Feby. 1, 1901.

Filed Feby. 1, 1901.

28 *Opinion amending findings of fact.*

The United States of America, district of South Carolina. In the circuit court.

ARTHUR LYNAH ET AL.
vs.
THE UNITED STATES.

This is an action tried in the circuit court, in the exercise of a jurisdiction coordinate, except as to amount, with that of the Court of Claims.

The plaintiffs claimed compensation for lands on the Savannah River taken by the Government in improving the navigation of that river.

It was tried, as the statute directs, by the court, without a jury. The case came on at the April term, 1900, of the court at Charleston, and was then taken under advisement. The term of the court at Charleston ended on the Monday preceding the third Tuesday in April of the same year. On this last-mentioned day the term for Greenville began. On 7th August, 1900, the Greenville term not having ended, the court filed its findings of fact and conclusions of law upon which verdict and judgment were entered for the plaintiffs. At the conclusion of the argument in April, counsel on both sides submitted in writing requests to find the facts and conclusions of law. Among the requests of the defendant was one that the court find as a fact that the land in question was between high and low water mark. This came under the consideration of the court, and it was fully under the impression that a finding of fact on that point had been made, as follows:

"IV. A certain parcel of this plantation, measuring about 420 acres, had been reclaimed by drainage and had been in actual continued use for seventy years and upwards as a rice plantation, used solely for this purpose. This rice plantation was dependent for its irrigation upon the waters of the Savannah River, and its ditches, drains, and canals, through and by which the waters of the river were flowed in and upon the lands and were then drained therefrom, were adapted to the natural level of the said Savannah River and dependent for their proper drainage and cultivation upon the maintenance of the natural flow of the said river in, through, and over its natural channel, along its natural bed, to the waters of the ocean.

29

"V. This portion of the plantation dedicated to the culture of rice was protected from the river by an embankment. Through this embankment trunks or waterways were constructed, with flood gates therein. The outer opening of the trunk was about a foot or a little less above the mean low-water mark of the river, in which the tide ebbs and flows. When it is desired to flow the lands, the flood gates are opened and the water comes in. When it is desired to draw off this water and to effect the drainage of the lands, the flood gates are opened at low water and the water escapes. It is essential that the outlet of the trunks or waterways should always be above the mean low-water mark."

The defendant, being satisfied that such finding has not been distinctly made, has submitted a motion for a new trial, for the purpose of getting such a finding of fact, or, in the alternative, that the court will amend the findings of facts on this point. It may be well to remark that no finding

on this point would have affected the conclusion of law reached by the court. The finding of facts show that plaintiffs and their ancestors had been in the actual, exclusive, pedis possessio of all this land, high
30 land and rice land, down to the embankment of the river at low-water mark, holding under a grant from the English Crown. This long-continued, actual, adverse possession would give a complete title as against the world.

With regard to the motion for a new trial.

Although this court is in the exercise of the jurisdiction of the Court of Claims, it does this in accordance with its own course of procedure. (Section 4, act March 3, 1887, 24 Statutes at Large, 505; U. S. vs. Chase, 155 U. S., 487.) When this motion for a new trial was made, not only was the term ended in which the case was tried, but the term within which judgment was filed had also ended. The motion comes too late. It is true that by section 1088 of the Revised Statutes a new trial can be granted at any time in the Court of Claims pending a cause or within two years after its adjudication, when the court is satisfied that any wrong, fraud, or injustice has been done the United States. But this provision seems to apply to the Court of Claims only. And this view is strengthened by the fact that the act of 1887, supra, in its 8th section, declares that section 1080 of the Revised Statutes (a section in the title fixing the jurisdiction of the Court of Claims) shall apply to cases under this act. The maxim expressio unius, &c., would seem to exclude the adoption of a provisions not expressly menti ned.

As to the proposed amendment. A question like this came up in Insurance Co. vs. Boon, 95 U. S., 111. A cause had been heard by the court without a jury. A judgment was rendered without a formal finding of facts. After the close of the term in which the judgment was entered, a motion was made to correct the record by incorporating into it, nunc pro tunc, a special finding of the facts upon which the judgment had been rendered. The case is carefully considered. The court
31 stating the question say: "It is familiar doctrine that courts always have jurisdiction over their records to make them conform to what was actually done at the term, and whatever may have been the rule announced in some old cases, the modern doctrine is that some orders and amendments may be made at a subsequent term and directed to be entered and become of record as of a former term. * * * Generally it may be admitted that judgments cannot be amended after the term at which they were rendered, except as to defects or matters of form. But every court of record has power to amend its records so as to make them conform to and exhibit the truth. Ordinarily there must be something to amend by, but that may be the judge's minutes or notes, not themselves records, or anything that satisfactorily shows what the truth was." The amendment in that case was allowed, nunc pro tunc, it contradicting nothing in the record.

In the case at bar we have the notes of testimony showing that the question was made, the requests of defendant to find, and the recollection of the judge, and the proposed amendment contradicts nothing in the record. In re Wight (134 U. S., 145) is to the same effect. An amendment to the record was allowed in a criminal case. The court say, when the objection to the amendment is based solely upon the technical point that

the term has passed at which the record was made up, it would be doing violence to the spirit which pervades the administration of justice in the present age to sustain it. This power, of necessity, exists in the district court, and its exercise must in great measure be governed by the facts of the case. An amendment will be allowed.

It is ordered that the fifth finding of fact be amended, nunc pro tunc, as follows: Strike out the first sentence and insert:

"That portion of the plantation fronting on the river and dedicated to the culture of rice extended almost up to, if not quite to, low-water mark, and a large part of it was between mean high-water mark and low-water mark, protected from the river by an embankment."

CHARLES H. SIMONTON,
Circuit Judge.

25 January, 1901.
Filed Janv. 25, 1901.

33 *Writ of error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the Circuit Court of the United States for the District of South Carolina, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, or some of you, between Arthur Lynah et al., plaintiff, and the United States, defendant, a manifest error hath happened, to the great damage of the said The United States, defendant, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, D. C., on the 2nd day of March next, in the said Supreme Court of the United States, to be then and there held, that, the record and proceedings aforesaid being inspected, the Supreme Court of the United States may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of our Supreme Court, the 2nd day of February, in the year of our Lord one thousand nine hundred and one.

J. E. HAGOOD,
Clerk of the Circuit Court of the United States, Dist. South Carolina.

Allowed by

CHARLES H. SIMONTON,
Circuit Judge.

We acknowledge service of the within writ.

BRYAN & BRYAN.

Feb'y 2, 1901.

34 *Citation.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Arthur Lynah, J. H. Lynah, Edward Lynah, James Lynah, Emma P. Lynah, Jane L. Lynah, Susan N. Lynah, Kate McD. Cunningham (born Lynah), Marie Glover Jenkins (born Lynah), Annie McD. Hopkins (born Lynah), Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington, District of Columbia, on the 2nd day of March next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of South Carolina, fourth circuit, wherein the United States is plaintiff in error and you are defendant' in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Charles H. Simonton, judge of the circuit court of the United States, this 2nd day of February, in the year of our Lord one thousand nine hundred and one.

CHARLES H. SIMONTON,
Circuit Judge.

Feb'y 1st, 1901.

We acknowledge service of the within citation this 2 day of February, 1901.

BRYAN & BRYAN,
Attys. for Petitioners.

Filed in this office Feb. 2, 1901. J. E. Hagood, C. C. C. U. S., Dist. S. C.

35 *Clerk's certificate.*

The United States of America, district of South Carolina. In the circuit court, fourth circuit.

I, J. E. Hagood, clerk of the circuit court of the United States for the district of South Carolina, do hereby certify that the foregoing is a true and correct copy of the records, proceedings, and of the judgment in the case of Arthur Lynah et al., plaintiffs, petitioners, against the United States, defendant, as directed by counsel for plaintiff in error, rendered as aforesaid, together with the proceedings had in the cause relating to same.

Given under my hand and seal of said court, at Charleston, S. C., in the district aforesaid, this 2nd day of February, A. D. 1901.

[SEAL.] J. E. HAGOOD,
C. C. C. U. S., Dist. S. C.

36 Office Supreme Court of U. S. Received Feb. 7, 1901.

(Indorsement on cover:) File No. 18048. South Carolina C. C. U. S. Term No. 248. The United States, plaintiff in error, vs. Arthur Lynah et al. Filed February 7, 1901.

In the Supreme Court of the United States.

OCTOBER TERM, 1902.

THE UNITED STATES, PLAINTIFF IN ERROR, v. ARTHUR LYNAH ET AL. } No. 45

THE UNITED STATES, PLAINTIFF IN ERROR, v. CHARLES A. WILLIAMS AND AMELIA S. Williams. } No. 59.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA.

BRIEF FOR THE UNITED STATES.

STATEMENT.

These are actions brought under the provisions of the act of Congress of March 3, 1887 (c. 359, 24 Stat. L., 505), "An act to provide for the bringing of suits against the Government of the United States;" and are based upon an implied contract on the part of the Government to make compensation for the alleged taking for public use of lands, the private property of the plaintiffs.

The cases were tried by the court without a jury.

The facts, which are substantially the same in both cases, are stated, with full detail, in the findings of facts made by the court. (Tr. No. 45, pp. 6–9; Tr. No. 59, pp. 8–10.) They are, in short, as follows:

The plaintiffs, defendants in error, are the owners of plantations on the Savannah River, in South Carolina, portions of which, fronting on the river, have been in cultivation for a long period of time as rice plantations, and solely for that purpose. They derive title by proper mesne conveyances from "a grant by the lords proprietors of South Carolina," made in the one case in 1736, in the other in 1738.

These lands have been "reclaimed" by drainage and the erection of dikes or banks; they were dependent for irrigation upon the waters of the Savannah River, and ditches, drains, and canals, through and by which the waters of the river were flowed in and upon the lands and were then drained therefrom, which were adapted to the natural level of the river, and dependent for their proper drainage and cultivation upon the maintenance of the natural flow of that stream through and over its natural channel along its natural bed to the waters of the ocean, and the maintenance of the natural level of the waters of that river.

They were protected by embankments, through which trunks or waterways were constructed with flood gates, which trunks were placed in such embankments so that the bottoms were above the mean low-water mark. Through these the lands were irrigated and drained, and were dependent upon the natural

rise and flow of the tide to effect this drainage. It is absolutely necessary for the production of rice that the fields should be thus flooded and drained.

For several years the United States Government has been making, erecting, and maintaining structures in the Savannah River, beginning at points below these plantations, and in dumping mud and sand dredged from the Savannah River proper into the Savannah Back River below these plantations, tending thereby to stop up said river and decrease the natural flow and current thereof. By reason of these obstructions and works the natural flow of the river has been changed, and its waters have been kept back and flowed back and lifted above the natural level of the river in its natural bed.

The direct effect of these works is to raise the level of the river at these plantations, causing the water to lie, remain, and be upon the plantations without being capable of being drained off. The flooding is now a permanent condition, and the plantations reduced to bogs, unfit for the cultivation of anything, and of no value. Plaintiffs have been compelled to abandon the cultivation of these plantations.

The gradual result was begun to be felt when the cross-tides dam between Hutchinsons Island and Argyle Island was built in 1885, the same having been completed in 1890, and has grown worse with the continuing erection of obstructions and dumping of material, and the continued seepage and percolation, by which the lands became gradually more sodden,

boggy, and sour, and incapable of producing rice, the only system of cultivation of which the land is capable. The claimants were finally driven away and forced to abandon the plantation in 1895.

Beyond the backing up of the water on the plantations by reason of the obstructions and works of the Government, and the holding back of the waters brought down by the freshets, and the invasion of the land by the superadded water, the Government does not use the lands for any purpose, nor is it in possession of them.

These obstructions and dams and structures were erected, and all the work in and about the Savannah River was done, to improve the navigability of that river. The plantations involved in these suits were above the works on the river, and the works do not rest upon or touch the lands of plaintiffs. Of the premises described in case No. 45, *United States* v. *Lynah*, the portion alleged to have been taken in the manner above described, fronting on the river and dedicated to the culture of rice, extended almost up to, if not quite to, low-water mark, and a large part of it was between mean high-water mark and low-water mark, protected from the river by an embankment. (Tr., p. 16.)

And in the case of *Williams* v. *United States*, No. 59, the portion of the plantation alleged to have been taken is on the fresh tidal waters of the Savannah River, the surface of which lies between high and low water. This was granted by the lords proprietors of South Carolina in 1738 and the grant thereafter con-

firmed by act of the legislature of South Carolina. It has been for over a century protected from the river or any invasion of tidal water by an embankment and cultivated in rice, and was so cultivated by the plaintiffs since their ownership of the said plantations in 1876 up to the time of the abandonment thereof. (Tr., p. 13.)

Upon these facts the court announced these conclusions of law:

> I. The cause of action accrued within six years of the commencement of this action.
>
> II. The Government of the United States, in undertaking this improvement of the navigation of the Savannah River, was and is exercising its lawful power in its right to regulate commerce, subject to the fifth amendment. (*Monongahela N. Co.* v. *United States*, 148 U. S., 336, 337.)
>
> III. Every riparian proprietor whose lands lie on a navigable water of the United States holds these lands with notice that the Government has the right to improve the navigation in such a mode as it deems most advisable.
>
> IV. If, therefore, such riparian proprietor suffer damage incidental to or consequential upon such improvement, he can not under any circumstances treat the Government as a trespasser or tort feasor; and can not, under the fifth amendment, demand compensation, unless there is an actual physical invasion of and taking of his land for the public purpose—a physical invasion of the real estate of the private owner and a practical ouster of his possession. (*Gibson* v. *The United States*, 166 U. S., 269.)

V. That portion of the plantation fronting on the river and dedicated to the culture of rice extended almost up to, if not quite to, low-water mark, and a large part of it was between mean high-water mark and low-water mark, protected from the river by an embankment. The facts found show that by reason of the obstruction in the Savannah River the water had been directly backed up against the embankment on the river and the banks on and in this plantation, the superinduced addition of water actually invading it and destroying its drainage and leaving it useless for all practical purposes. The Government does not in a sense take this land for the purpose of putting its obstructions on it; but it forces back the water of the river on the land as a result necessary to its purpose, without which its purpose could not be accomplished. For the purpose of the Government that water in the river must be raised. The banks of this plantation materially assist this operation, for by their resistance the water is kept in the channel. The backing up of the water against the banks to create this resistance raises the water in the plantation and destroys the drainage of the plantation. This is a taking. "It would," says Mr. Justice Miller, "be a very curious and unsatisfactory result if, in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the Government and which had received the commendation of jurists, statesmen, and commentators as placing the just principles of the common law

on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the Government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject to total destruction without making any compensation, because in the narrowest sense of that word it has not been taken for the public use." (*Pumpelly* v. *Green Bay Co.*, 13 Wall., 177, 178.) In that case the backing up of water on land was held to be a taking.

VI. The plantation of plaintiffs being actually invaded by superinduced addition of water directly caused by the Government dams and obstructions backing up the water of the Savannah River and raising the water level at and in the rice plantation and making it unfit for rice cultivation or for any other known agriculture, and plaintiffs having been compelled thereby to abandon the plantation, and this actual and practical ouster of possession being continued and permanent by reason of the permanent condition of the flooding of the plantation, and the plantation being thereby now an irreclaimable bog of no value, makes the action of the Government a taking of lands for public purposes within the meaning of the fifth amendment, for which compensation is due to the plaintiffs. (*Pumpelly* v. *Green Bay Co.*, 13 Wall., 182; *Mugler* v. *Kansas*, 123 U. S., 668.)

VII. The Government has not gone into actual occupancy of this land, but by reason of these dams and obstructions made necessary by

this public work and fulfilling its purpose the water in the Savannah River has been raised at the plaintiff's plantation and has been backed up on it and remains on it so that the drainage has been destroyed and ditches filled up and superadded water permanently kept on the land and forced up into it, making it wholly unfit for cultivation, and the plaintiffs have thereby been practically and actually ousted of their possession. This is taking of the land for public purposes, for which compensation must be provided. (*Pumpelly* v. *Green Bay Co.*, 13 Wall., 181.)

VIII. The plaintiffs are entitled to just compensation for the taking of the —— acres of rice land. This is estimated to be —— thousand dollars, the value of the land so taken, for which amount let the plaintiffs have judgment.

Judgments were entered for the plaintiffs and the United States brings these writs of error.

The following assignments of error were filed in the court below. (They are substantially the same in both cases.)

I. The court erred in holding that the cause of action first accrued within six years of the commencement of this action.

II. The court having found, as a matter of fact, that the Cross Tides dam, the principal Government work complained of in this action, was completed in 1890, and that this action was commenced on the 22d day of March, 1897, the court erred in failing to hold that the alleged cause of action first accrued more than six years before the commencement of this action.

III. The court erred in holding that the direct result of the Government works of improvement in the Savannah River is an actual and practical ouster of plaintiffs from their possession of the rice plantation in question.

IV. The court erred in holding as follows: "The facts found show that by reason of the obstructions so placed in the Savannah River, and the dumping of mud and sand therein, the water of the river has been directly backed up and against the banks of this plantation and forced on the land, the superinduced addition of water actually invading it, destroying its drainage, and through seepage and percolation raising the level of the water within the plantation to the level of the water in the river, and in addition thereto holding back and restraining in, over, and upon said plantation the freshets, the water from which was retained upon the same, by all of which the plantation has been rendered absolutely valueless; all of which is the result of the Government improvements and works, without which its purposes could not be carried out and effected. This is a taking within the meaning of the fifth amendment."

V. The court erred in holding that the erection and maintenance of Government works in the bed of a navigable tidal river, for the improvement of the navigation thereof, whereby the water in said river is backed up against the banks of a rice plantation lying on said river, and destroying the drainage thereof, amounts to a taking of said plantation for public use.

VI. The court erred in holding that a riparian owner of rice lands, dependent for their irrigation and drainage upon the natural flow of the waters of a tidal river, is entitled to compensation by the Government under the fifth amendment to the Constitution for damages arising from the construction and maintenance of Government works for the improvement of navigation of said river, erected and maintained wholly within the bed of said river, by which the mean low-water level of said river is raised and the natural drainage of said lands destroyed.

VII. The court erred in holding as follows: "The plantation of the plaintiffs being actually invaded by the superinduced addition of the water directly caused by the Government dams, obstructions, and works backing up the water of the river, and raising the water level at and upon and in the rice plantation, and holding back and retaining upon the same the freshets, and making the same absolutely unfit for the cultivation of rice or of any other known article; and plaintiffs having been compelled thereby to abandon their plantation, and being practically ousted of possession, and this being a permanent and continued condition, and the plantation being thereby rendered irreclaimable and become of no value, renders the action of the Government a taking of land for public purposes, within the meaning of the fifth amendment to the Constitution, for which compensation is due to the plaintiffs."

VIII. The court erred in holding that the property of the plaintiffs has been taken by the Government for public use.

IX. The court erred in holding as follows: "The plaintiffs are entitled to just compensation for the taking of —— acres of land."

X. The court erred in holding that the plaintiffs are entitled to recover upon the facts found by the court in this action.

XI. The court erred in failing to hold that the intention of the Government in the erection and maintenance of the works of improvement in question was only to improve its own property, and not to acquire the property of another.

XII. The court erred in failing to hold that plaintiffs' title to the rice land lying between high and low water on a tidal river was subservient to the right of the Government to cause the waters of said river to be held back thereon for the benefit of navigation, without compensating the owners for damagas resulting therefrom.

XIII. The court erred in failing to hold that the damages resulting from the prosecution of this improvement of a navigable highway for the public good was not the result of a taking of plaintiffs' property, and was merely incidental to the exercise of a servitude to which the property has always been subject.

XIV. The court erred in failing to hold that the complaint should be dismissed, with costs to the defendant.

ARGUMENT.

It is stated in the findings of fact in these cases that these plaintiffs held title under sundry mesne conveyances connecting their title with grants by the lords proprietors of South Carolina; in the one case a

grant made in 1736, in the other, a grant made in 1738. In the case of the latter grant (and presumably in the other) it is found that the grant was thereafter confirmed by act of the legislature of South Carolina. (Tr. No. 59, p. 13.)

The charters of South Carolina were granted by Charles II in 1663 and 1665. These charters were surrendered to the King, George II, in 1729, and the government of Carolina became regal; and the province was divided into North and South Carolina by an order of the British Council, which fixed the boundaries between the two provinces. (1 Stat. L. South Carolina (Cooper), 22–41.)

All grants previously made by the lords proprietors were made valid in South Carolina in 1731. (Rev. Stat. South Carolina, 1893, sec. 1873.) This is the confirmation, it is supposed, which is claimed to confirm the grant from which the Williams's title is derived. Although it may not be material in the determination of the rights of the plaintiffs in these cases, this statute does not affect the grants relied on, which were made, according to the findings, several years before its passage. However, the grants, whether from the lords proprietors or the Crown, would be of the same and equal extent.

Upon the application for an amended or additional finding of fact by counsel in the Williams case, No. 45, that the lands involved were between high-water mark and low-water mark on the river, the learned circuit judge, in the opinion making the finding, says:

"It may be well to remark that no finding on this point would have affected the conclusion of law reached by the court. The findings of facts show that plaintiffs and their ancestors had been in the actual, exclusive, pedis possessio of all this land, high land, and rice land, down to the embankment of the river at low-water mark, holding under a grant from the English Crown. This long continued, actual, adverse possession would give a complete title as against the world." I presume this is not intended to set up a title by adverse possession as against the State or the United States, or by prescription or usage; for the findings expressly state there was a grant from the lords proprietors, from which, through mesne conveyances, the premises came to the possession of the plaintiffs.

The grants are not set out in the findings. But in the petition, in the Lynah case, No. 45, the lands are described as follows: "All the plantation or tract of land called Vernezobre, situate, lying, and being on the Savannah River, in St. Peters Parish, Beaufort district, and State aforesaid, butting and bounding to the north on land of the late John M. Chisolm and Elliott Guerard; to the east on lands formerly of —— Brisbane; *to the west on Savannah River*, lands of Elliott Guerard and Daniel Heyward, esq.; to the south on lands of Daniel Heyward, Elliott Guerard, and Pringle Smith, esqs., measuring and containing two thousand one hundred (2,100) acres, more or less." (Tr. No. 45, p. 2.) The map annexed to the petition (p. 12) shows the tract lying on the river, which is

mentioned as the rice plantation, marked No. 1. The description is manifestly taken from the deed to the immediate ancestor of the plaintiffs. If this description is that of the grant, then the original grantees did not take any shore, or land between high-water and low-water mark, by the laws of England, for the water boundary was "on Savannah River," and the grant extends only to high-water mark. The same rule obtains in the United States, and is established in South Carolina. (*United States* v. *Pacheco*, 2 Wall., 587; *State* v. *Pinckny*, 22 S. C., 484, 507.) So that, if there was confirmation, the extent of the grant remains the same.

These suggestions apply to both cases, Nos. 45 and 59. In view of the findings of facts as to the grant, and that no allusion was made to the expressions and enumerations thereof in the court below, it may be held that the grant included the shore lands. I will, therefore, in the further argument treat it thus. I have alluded to the matter, not for the purpose of evading the broad propositions presented, but, in caution, against any presumption founded upon long and uninterrupted possession.

II.

The charters of Carolina were similar to that granted to the Duke of York for New Jersey; and, in the language of *Martin* v. *Waddell*, did not differ materially from it in the terms in which the bays, rivers, and arms of the sea, and the soils under them, were conveyed to the grantees.

In *Shively* v. *Bowlby* (152 U. S., 1, 13) Justice Gray, delivering the opinion of this court, says:

> In England, from the time of Lord Hale, it has been treated as settled that the title in the soil of the sea, or of arms of the sea, below ordinary high-water mark is in the King, except so far as an individual or a corporation has acquired rights in it by express grant or by prescription or usage (citing numerous authorities); and this title, *jus privatum*, whether in the King or in a subject, is held subject to the public right, *jus publicum*, of navigation and fishing (and authorities).
>
> It is equally well settled that a grant from the sovereign of land bounded by the sea, or by any navigable tide water, does not pass any title below high-water mark, unless either the language of the grant, or long usage under it, clearly indicates that such was the intention.

And in the case of *Morris* v. *United States* (174 U. S., 196,226), Justice Shiras, speaking for the court, referring to the property in the soil under navigable waters, epitomizes the conclusions of the former cases, saying they decided—

> that the various charters granted by different monarchs of the Stuart dynasty for large tracts of territory on the Atlantic coast conveyed to the grantees both the territory described and the powers of government, including the property and the dominion of lands under tide waters; that by those charters the dominion and propriety in the navigable waters and in the soils under them passed as part of

> the prerogative rights annexed to the political powers conferred on the patentee, and in his hands were intended to be a trust for the common use of the new community about to be established, as a public trust for the benefit of the whole community, to be freely used by all for navigation and fishery, and not as private property to be parceled out and sold for his own individual emolument; that, upon the American Revolution, all the rights of the Crown and of Parliament vested in the several States, subject to the rights surrendered to the National Government by the Constitution of the United States; that when the Revolution took place the people of each State became themselves sovereign, and in that character hold the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution to the General Government.

There can be no doubt that, in England, a subject may be owner of a portion or tract of shore, by ancient charter or grant. (*Hall, Sea Shore*, 15; Hale, *de jure* Maris, Hay, L. T., c. V.; 5 Co., 107.)

And so, as we have seen above, in this country the individual may be owner of a portion of shore by grant from the State.

But the subject or individual takes this ownership, whether from the Crown or the State, subject to the trust, which can not be destroyed or diminished.

> It is the settled law of this country that the ownership of and dominion and sovereignty

over lands covered by tide waters within the limits of the several States belong to the respective States within which they are found, with the consequent right to use or dispose of any portion when that can be done without substantial impairment of the interest of the public in the waters, and subject always to the permanent right of Congress to control their navigation so far as may be necessary for the regulation of commerce with foreign nations and among the States. * * *

When the reason of the limitation of admiralty jurisdiction in England was found inapplicable to the condition of navigable waters in this country the limitation and all its incidents were discarded. So, also, by the common law, the doctrine of the dominion over and ownership by the Crown of lands within the realm under tide water is not founded upon the existence of the tide over the lands, but upon the fact that the waters are navigable, tide waters and navigable waters, as already said, being used as synonymous terms in England. The public being interested in the use of such waters, the possession by private individuals of lands under them could not be permitted except by license of the Crown, which could alone exercise such dominion over the waters as would insure freedom in their use so far as consistent with the public interest. The doctrine is founded upon the necessity of preserving to the public the use of navigable waters from private interruption and encroachment, a reason as applicable to navigable fresh waters as to waters moved by

the tide. (*Illinois Central R. R.* v. *Illinois*, 146 U. S., 387, 435.)

And, further, as to the character of the State's title thus granted, the court said (p. 452):

> It is a title different in character from that which the State holds in the public lands which are open to preemption and sale. It is a title held in trust for the people of the State, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, freed from the obstruction or interference of private parties. The interest of the people in the navigation of the waters and in commerce over them may be improved in many instances by the erection of wharves, docks, and piers therein, for which purpose the State may grant parcels of the submerged lands; and so long as their disposition is made for such purpose no valid objection can be made to the grants. It is grants of parcels of lands under navigable waters that may afford foundation for wharves, piers, docks, and other structures in aid of commerce, and grants of parcels which, being occupied, do not substantially impair the public interest in the lands and waters remaining, that are chiefly considered and sustained in the adjudged cases as a valid exercise of legislative power consistently with the trust to the public upon which such lands are held by the States. But that is a very different doctrine from the one which would sanction the abdication of the general control of the State over lands under the navigable waters of an entire harbor or bay or of a sea or lake.

> Such abdication is not consistent with the exercise of that trust which requires the government of the State to preserve such waters for the use of the public. The trust devolving upon the State for the public and which can only be discharged by the management and control of property in which the public has an interest can not be relinquished by a transfer of the property.

It is undisputed that the title to the shores of the sea and adjacent lands covered by water is in the States. "What is equally true," as Mr. Justice Bradley said in *Stockton* v. *Baltimore & N. Y. R. Co.* (32 Fed. Rep., 9, 19), is "that, after the conquest, the said lands were held by the State, as they were by the King, *in trust* for the public use of navigation and fishery, and the erection thereon of wharves, piers, light-houses, beacons, and other facilities of navigation and commerce. Being subject to this trust, they were *publici juris;* in other words, they were held for the use of the people at large."

In South Carolina the rule is stated:

> The State had in the beds of these tidal channels not only title as property, the *jus privatum*, but something more, the *jus publicum*, consisting of the rights, powers, and privileges derived from the British Crown, and belonging to the governing head, which she held in a fiduciary capacity for general and public use; in trust for the benefit of all the citizens of the State, and in respect to which she had trust duties to perform. (3 Kent, 377; *Martin* v.

Waddell, 16 Peters, 367; *Commonwealth* v. *Roxbury*, 9 Gray, 451.

(*State* v. *Pacific Guano Co.*, 22 S. C., 48, 83.)

III.

The extent and character of the title by the grant from the Crown is clearly shown by reference to *Attorney-General* v. *Parmeter* (10 Price, 378). It was an information complaining of a nuisance in the harbor of Portsmouth. The defendants had inclosed with wooden piles a parcel of mud land between high and low water marks, which land was used for a timber pound, and had built upon the same a wharf or quay. The information alleged, which was admitted, that the King had granted, by letters patent, all and singular the lands and marshes surrounded and overflowed, or subject to the overflowing of the sea, to certain persons from whom the defendants claimed by purchase, the lands in question, in the harbor. And it also alleged, among many other things, that if such parts of the harbor had been ever granted by the Crown to any person or persons, under whom the defendants claimed, yet that such grant did not and could not extend to deprive His Majesty or his subjects of the free use and enjoyment of such parts of the said harbor or the free passage, repassage and anchorage, mooring and lying of all ships and vessels, etc. The defendants, by their answer, after admitting the prerogative of the Crown, claimed they were in the possession as the absolute owners in fee simple, that the buildings were erected by them at their expense, and

that the fee simple and inheritance of the land had been purchased by them for a valuable consideration.

Macdonald, Ch. B., delivered the judgment of the court. In the opinion, he said (p. 401):

> Now I take it that nothing can be clearer than that the King can in no degree affect the public right of the subject passing and repassing upon the salt water: he can not affect that by anything which can be done by him. Lord Hale lays down clearly *that ports, creeks, and havens are the subjects of the public right;* he describes what those are—a port, more immediately accommodated for protection, both naturally and artificially; a haven, that which does naturally protect, and where ships may ride or lie in safety, and a creek, a member of a port where there is no customer or comptroller, but where are certain officers for the purpose of collecting the King's revenues. In none of these places, therefore, can the public right be waived, although there might be a grant of the soil; but such grant must be considered as subject to that public right, which can not be disturbed.
>
> * * * * *
>
> Perhaps I might stop here at once and say, if in point of fact these ports and creeks, and part of the port of Portsmouth, is comprehended in the grant, that is by no means what the Crown could grant, so as to affect the jus publicum, which is the right of the subject universally. (*Supra*, p. 405.)

Lord Hale also says, De Jure Maris, cap. 6, page 36:

> That a subject may, by usage or prescription (of course, by grant), be owner or proprietor of

such an arm of the sea, creek, or particular portion of the sea contiguous to the shore, as is not a public port or haven.

Page 39:

Second. That the people have a public interest, *jus publicum*, of passage and repassage with their goods by water, and must not be obstructed by nuisances, or impeached by exactions, as will be shown when we come to consider of ports. For the *jus privatum* of the owner or proprietor is charged with and subject to that *jus publicum* which belongs to the King's subjects; as the soil of an highway is, which though in point of property it may be a private man's freehold, yet it is charged with a public interest of the people, which may not be prejudiced or damnified.

The grants to the plaintiffs in these cases, as we have seen, must have been from the Crown, as they were made in 1736 and 1738, after the surrender of the charters.

IV.

The inquiry in these cases is, at the threshold, the extent of the power granted to Congress, by the Constitution, to regulate commerce.

It is to be remembered that the Government has not taken possession of these lands by the erection of structures upon them or physically entering upon them. Even had they done so, my position is that this would have been within its power and competency to accomplish the purpose, under the direction

of Congress, of improving the navigability of the Savannah River.

This power, said Chief Justice Marshall, in *Gibbons* v. *Ogden*, 9 Wheat., 196:

> Like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution. These are expressed in plain terms and do not affect the questions which arise in this case. If, as has always been understood, the sovereignty of Congress, though limited to specific objects, is plenary as to those objects, the power over commerce with foreign nations and among the several States is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States.

In *Hoboken* v. *Railroad Co.* (124 U. S., 656) the court said:

> Over these lands it (the State) has absolute and exclusive domain, including the right to appropriate them to such uses as might best serve its views of the public interest, subject to the power conferred by the Constitution upon Congress to regulate foreign and interstate commerce.

In *Mobile* v. *Kimball* (102 U. S., 691, 696) the court said:

> That power (the commercial power of Congress) is, indeed, without limitation. It authorizes Congress to prescribe the conditions upon

> which commerce in all its forms shall be conducted between our citizens and the citizens or subjects of other countries, and between the citizens of the several States, and to adopt measures to promote its growth and insure its safety. And, as commerce embraces navigation, the improvement of harbors and bays along our coast, and of navigable rivers within the States connecting with them, falls within the power. The subjects, indeed, upon which Congress can act under this power are of infinite variety, requiring for their successful management different plans or modes of treatment. Some of them are national in their character, and admit and require uniformity of regulation affecting all the States; others are local or are mere aids to commerce and can only be properly regulated by provisions adapted to their official circumstances and localities. * * *

The improvement of harbors, bays, and navigable rivers, building of piers, wharves, etc., erection of dams, come within the regulation of commerce. (*Mobile* v. *Kimball, supra; Stockton* v. *Railroad, ut sup.*)

Congress has power to order obstructions to be placed in the navigable waters of the United States. It may build light-houses in the bed of the stream. It may construct jetties. (*Gilman* v. *Philadelphia*, 3 Wall., 724; *South Carolina* v. *Georgia*, 93 U. S., 4; *Telegraph Co.* v. *Telephone Co.*, 96 U. S., 1.)

I have said this much, possibly being subject to the criticism of prating over familiar and undisputed declarations of interpretation of the grants of the Constitution, because of the limitations which the arguments

of the counsel for the defendant in error, accepted by the learned circuit judge, seek to impose upon the exercise of this power. The force—the weakness, if you please—of this position is shown when we reflect that this limitation would equally apply to all grants made to the General Government. These powers must be complete; they can not be fettered, or cribbed, or confined. The greater or lesser extent of disability is of no difference.

The power in the United States includes "all the powers which existed in the States before the adoption of the Constitution." Whatever consequences follow in its exercise are to be provided for exactly as they had been or would be in the British Isles or in the States of the Union.

In the exercise of this power, as in all other instances, there can not be any conflict or friction with rights asserted and defined in other parts of the Constitution and its amendments. The great work of the founders of the Republic stands fully orbed; and the amendments, born of jealous caution, are in perfect harmony with the original design. There is nothing discordant; nothing doubtful. So that, while it has been often and discriminatingly said that a distinguishing peculiarity of this great establishment was the protection, by careful enunciation, of the rights of the individual man, yet, underlying all the provisions, is the recognition of the superior welfare of the body of the people. We, the people, for ourselves and our posterity ordain and establish this Constitution.

One of the primary objects, as has been so often stated, was to regulate commerce, and, in doing so, to reach out and absolutely control navigation and all the navigable waters of the country for the benefit of the people. When this court said, in *Martin* v. *Waddell*, that the sovereign people of each State hold the absolute right to all their navigable waters, and the soils under them, for their own common use subject only to the rights since surrendered by the Constitution to the General Government, and that the grants made by their authority must be determined by different principles from those which apply to grants of the British Crown; it was not meant, simply, that the people, through their representatives, could arbitrarily dispose of the trust property. That is not the theory of representative government. That would not be tolerated long in a fierce democracy.

The circuit court, in its conclusions of law, recognizes, to a degree, the principles I speak of. The judge says:

> The Government of the United States, in undertaking this improvement of the navigation of the Savannah River, was and is exercising its lawful power in its right to regulate commerce, *subject to the fifth amendment.* Every *riparian* proprietor whose lands lie on a navigable river of the United States holds those lands with notice that the Government has the right to improve the navigation in such a mode as it deems most advisable.
>
> If, therefore, such *riparian* proprietor suffer damage incidental to or consequential upon

> such improvement, he can not under any circumstances treat the Government as a trespasser or tort feasor, and can not, under the fifth amendment, demand compensation unless there is an actual physical invasion of and taking of his land for the public purpose—a physical invasion of the real estate of the private owner and a practical ouster of his possession. (The italics are mine.)

The court then found, it being a question of law and fact, that there had been such a taking of the land as entitled the parties to compensation. Reliance for this conclusion was had upon the principles laid down by this court in the cases of *Monongahela N. Co.* v. *United States* (148 U. S., 336–337); *Gibson* v. *United States* (166 U. S., 269); and explicitly, *Pumpelly* v. *Green Bay Co.* (13 Wall., 181).

These cases do not sustain the contention of the plaintiffs, the defendants in error.

Pumpelly v. *Green Bay Co.* was an action of trespass on the case. The plaintiff was the owner in fee simple of a tract of fast land. There was no question of a superior or other title. The point decided was that a serious interruption to the common and necessary use of private property, by reason of authorized works for public use, was a *taking* which entitled the owner to compensation. But the title of this owner was absolute, unfettered, unembarrassed. There was involved no prerogative right—no trust for the public use.

The *Monongahela Navigation* case is not at all of authority against my positions. The essential feature

of that case is that where, under the authority of the State, extensive and expensive improvements had been made by a corporation, representing the interests and the property of many citizens, for the purpose and with the effect of improving a navigable river, when the General Government saw fit, in the exercise of its power, to take charge of those works of improvement it should make *just* compensation for *all* it took possession of.

Why invoke *Gibson* v. *United States* (166 U. S., 269)? There can be no clearer statement than is there made:

> All navigable waters are under the control of the United States for the purpose of regulating and improving navigation, and although the title to the shore and submerged soil is in the various States and individual owners under them, it is always subject to the servitude in respect of navigation created in favor of the Federal Government by the Constitution.

This was said about the charged invasion of land, by the erection of structures in aid of navigation, upon a river where the improvements were many hundreds of miles above the flux and reflux of the tides.

But, away beyond all this, what private property was taken for which compensation should be made under this guarantee of the Constitution, which is only affirmative of a right to the individual in a free government like this? The Crown had property rights in these lands in trust. The State had property rights to these lands in trust. They were never surrendered. They could not be. And when the United States

reached out her hand and took possession of them to execute the trust to which she had succeeded, and which she was *legally* bound to execute, the inferior right had to yield, even to extermination. It is not for the courts to say that the individual has suffered and therefore should be reimbursed or compensated. If he has been, under a mistaken idea of his rights, put to labor and expense and hope, he has a remedy by application to the bounty of a Government which will, it is opined, do him justice. But no wrong has been done him. He has enjoyed these lands and their profits without money and without price. They were the common property of the whole people. The accident of adjacent ownership gave him the license and the privilege; for, in the last instance, it was a privilege.

The case of *South Carolina* v. *Georgia* (93 U. S., 1), came up upon the very same conditions and facts that these cases are here. South Carolina filed her bill in equity against Georgia praying an injunction to restrain that State from obstructing or interrupting the navigation of the Savannah River. The obstructions mentioned were exactly the same as the obstructions complained of by the plaintiffs in these cases. The case was based upon an alleged violation of a compact between the two States, by which it was covenanted that the navigation of the river should forever be equally free to the citizens of both States, and free from interruption; and that Congress had authorized obstructions against the rights of the complaining State. The opinion goes beyond, necessarily,

the simple question. That case was this: Immediately above the city of Savannah the river is divided by Hutchinsons Island, and there is a natural channel on each side of the island, both uniting at the head. The obstruction is at the point of divergence of the two channels, and its purpose and probable effect are to improve the southern channel at the expense of the northern by increasing the flow of the water through the former, thus increasing its depth and waterway. Mr. Justice Strong, delivering the opinion of the court, said:

> That the power to regulate interstate commerce and commerce with foreign nations, conferred upon Congress by the Constitution, extends to the control of navigable rivers between States, rivers that are accessible from other States, at least to the extent of improving their navigability, has not been questioned during the argument, nor could it be with any show of reason. From an early period in the history of the Government it has been so understood and determined. Prior to the adoption of the Federal Constitution the States of South Carolina and Georgia together had complete dominion over the navigation of the Savannah River. By mutual agreement they might have regulated it as they pleased. It was in their power to prescribe not merely on what conditions commerce might be conducted upon the stream, but also how the river might be navigated, and whether it might be navigated at all. They could have determined that all vessels passing up and down the stream

should pursue a defined course, and that they should pass along one channel rather than another where there were two. They had plenary authority to make improvements in the bed of the river, to divert the water from one channel to another, and to plant obstructions thereon at their will.

* * * * *

The action of the defendants is not, therefore, the destruction of the navigation of the river. True, it is obstructing the waterway of one of its channels and compelling navigation to use the other channel; but it is a means employed to render navigation of the river more convenient—a mode of improvement not uncommon. The two channels are not two rivers, and closing one for the improvement of the other is in no just or legal sense destroying or impeding the navigation. If it were every structure erected in the bed of the river, whether in the channel or not, would be an obstruction. It might be a light-house erected on a submerged sand bank, or a jetty pushed out into the stream to narrow the waterway and increase the depth of water and the direction and force of the current, or the pier of a bridge standing where vessels now pass and where they can pass only at very high water. The impediments to navigation caused by such structures are, it is true, in one sense obstructions to navigation, but so far as they tend to facilitate commerce it is not claimed they are unlawful. In what respect, except in degree, do they differ from the acts and constructions of which the plaintiff complains? All of them are obstructions to the natural flow of the river, yet

> all except the pier are improvements to its navigability, and consequently they add new facilities to the conduct of commerce. It is not, however, to be conceded that Congress has no power to order obstructions to be placed in the navigable waters of the United States, either to assist navigation or to change its direction by forcing it into one channel of a river rather than the other. It may build light-houses in the bed of the stream. It may construct jetties. It may require all navigators to pass along a prescribed channel, and may close any other channel to their passage.

Compare the facts of that case with the facts of these. Suppose the river, instead of having its bed raised by the operations of the Government, had been diverted from its channel altogether. The rice plantations of the plaintiffs—the land between high and low water marks—would have been undoubtedly rendered utterly valueless; because rice could not have been cultivated without the flooding of the lands. This matter was between States. Individual rights were not involved. But can it be that the great power, so carefully considered, can be shorn of its efficacy to favor a comparative individual right?

In this connection I insist that the doctrines clearly laid down in the late case of *Scranton* v. *Wheeler* (179 U. S., 141) are conclusive of these questions. That case was not, however, upon rights of owners upon tide waters and did not treat of the servitude upon shore land. And yet this court, discussing the broad claim of the Government, said:

All the cases concur in holding that the power of Congress to regulate commerce, and therefore navigation, is paramount, and is unrestricted unless except by the limitations upon its authority by the Constitution. Of course, every part of the Constitution is as binding upon Congress as upon the people. The guaranties prescribed by it for the security of private property must be respected by all. But whether navigation upon waters over which Congress may exert its authority requires improvement at all, or improvement in a particular way, are matters wholly within its discretion; and the judiciary is without power to control or defeat the will of Congress, so long as that branch of the Government does not transcend the limits established by the supreme law of the land. Is the broad power with which Congress is invested burdened with the condition that a riparian owner whose land borders upon a navigable water of the United States shall be compensated for his right of access to navigability whenever such right ceases to be of value solely in consequence of the improvement of navigation by means of piers resting upon submerged lands away from the shore line? We think not. The question before us does not depend upon the inquiry whether the title to the submerged lands on which the new south pier rests is in the State or in the riparian owner. It is the settled rule in Michigan that "the title of the riparian owner extends to the middle line of the lake or stream of the inland waters." (*Webber* v. *The Pere Marquette Boom Co.*, 62 Mich., 626, and authorities there

cited.) But it is equally well settled in that State that the rights of the riparian owner are subject to the public easement or servitude of navigation. (*Lorman* v. *Benson*, 8 Mich., 18, 32; *Ryan* v. *Brown*, 18 Mich., 196, 207.) So that whether the title to the submerged lands of navigable waters is in the State or in the riparian owners, it was acquired subject to the rights which the public have in the navigation of such waters. The primary use of the waters and the lands under them is for purposes of navigation, and the erection of piers in them to improve navigation for the public is entirely consistent with such use, and infringes no right of the riparian owner. Whatever the nature of the interest of a riparian owner in the submerged lands in front of his upland bordering on a public navigable water, his title is not as full and complete as his title to fast land which has no direct connection with the navigation of such water. It is a qualified title, a bare technical title, not at his absolute disposal, as is his upland, but to be held at all times subordinate to such use of the submerged lands and of the waters flowing over them as may be consistent with or demanded by the public right of navigation. In *Lorman* v. *Benson*, above cited, the supreme court of Michigan, speaking by Justice Campbell, declared the right of navigation to be one to which all others were subservient. The learned counsel for the plaintiff frankly states that compensation can not be demanded for the *appropriation* of the submerged lands in question, and that the United States under the power to regulate commerce has an

unquestioned right to *occupy* them for a lawful purpose and in a lawful manner. This must be so—certainly in every case where the use of the submerged lands is necessary or appropriate in improving navigation. But the contention is, that compensation must be made for the loss of the plaintiff's access from his upland to navigability incidentally resulting from the occupancy of the submerged lands, even if the construction and maintenance of a pier resting upon them be necessary or valuable in the proper improvement of navigation. We can not assent to this view. If the riparian owner can not enjoy access to navigability because of the improvement of navigation by the construction away from the shore line of works in a public navigable river or water, and if such right of access ceases alone for that reason to be of value, there is not, within the meaning of the Constitution, a *taking of private* property for public use, but only a consequential injury to a right which must be injoyed, as was said in the *Yates case*, "in due subjection to the rights of the public"—an injury resulting incidentally from the exercise of a governmental power for the benefit of the general public, and from which no duty arises to make or secure compensation to the riparian owner. The riparian owner acquired the right of access to navigability subject to the contingency that such right might become valueless in consequence of the erection under competent authority of structures on the submerged lands in front of his property for the purpose of improving navigation. When erecting the

pier in question the Government had no object in view except, in the interest of the public, to improve navigation. It was not designed arbitrarily or capriciously to destroy rights belonging to any riparian owner. What was done was manifestly necessary to meet the demands of international and interstate commerce. In our opinion, it was not intended that the paramount authority of Congress to improve the navigation of the public navigable waters of the United States should be crippled by compelling the Government to make compensation for the injury to a riparian owner's right of access to navigability that might incidentally result from an improvement ordered by Congress. The subject with which Congress dealt was navigation. That which was sought to be accomplished was simply to improve navigation on the waters in question so as to meet the wants of the vast commerce passing and to pass over them. Consequently the agents designated to perform the work ordered or authorized by Congress had the right to proceed in all proper ways without taking into account the injury that might possibly or indirectly result from such work to the right of access by riparian owners to navigability.

To conclude: The plaintiff in error claims that, conceding the interest and property which the defendants in error had in these lands, there was not in them a title to "such kind of property as was susceptible of pecuniary compensation, within the meaning of the Constitution." What the Government took, and takes

under similar circumstances, was the public property. It is not going too far, maybe, to assert that no private property is taken at all. The private property under the grant is eclipsed when the necessity for public use is properly determined. How could there be a settlement of the value of the private property? By what rule could the measure of damage and injury be arrived at? All the land on all the coasts and tide waters of the country might be affected by the exercise of this necessary and sovereign and paramount power—paramount against States and individuals in exactly the same degree. And it is not extravagant to say that the power might be dangerously hurt and imperiled if it was subject to doubt or cavil or diminution.

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Solicitor-General.

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In the Supreme Court of the United States.

OCTOBER TERM, 1902.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
ARTHUR LYNAH ET AL. } No. 45.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
CHARLES A. WILLIAMS AND AMELIA S. WILLIAMS. } No. 59.

REPLY BRIEF FOR THE UNITED STATES.

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REPLY BRIEF FOR THE UNITED STATES.

I.

THE JURISDICTION.

The cause of action in each of these cases is upon an implied contract to make compensation for lands alleged to have been taken by the Government for public use.

It was stated by the circuit court, and is fully admitted by counsel for defendants in error, that the acts of the Government in placing obstructions in the Savannah River were done in the lawful exercise of its authority to improve the navigation of that river, under the constitutional power to regulate commerce. It is not claimed that there was an improper or negligent

construction of the works by the agents of the Government. It is expressly stated that the Government has not gone into the actual occupancy of these lands. It is perfectly plain that there was no contemplation or intention by the legislation, appropriating for these improvements, to take or to impair, in any manner or in any sense, this property.

The whole contention of the plaintiffs in these cases is that the Government caused a total destruction of their property by the erection of works in the Savannah River for the improvement of its navigability, and that this was a taking of their lands, within the meaning of the Constitution—providing for just compensation for taking private property. But if the taking was resultant upon an injury or disturbance of one's right to property, how is there a consideration for a contract to make compensation? Nor can it be said that the tort may be waived and a suit brought on a contract. Under the circumstances here the supposed contract springs from the tort. But the tort, which may be waived, must be because of the contract. As this court said, in *Lloyd* v. *Hough* (1 How., 153, 159), "Whatever, then, excludes all idea of a contract, excludes at the same time a remedy which can spring from contract only, which affirms it, and seeks its enforcement."

The act of March 3, 1887, under which these suits were brought, permits the Government to be sued upon contracts, express or implied. The jurisdiction of the court is limited to cases of contract. Cases sounding

in tort were expressly excluded. As was said by Justice Miller in *Langford* v. *United States* (101 U. S., 341, 344), "There can be no reasonable doubt that this limitation to cases of contract, express or implied, was established in reference to the distinction between actions arising out of contracts, as distinguished from those founded on torts, which is inherent in the essential nature of judicial remedies under all systems, and especially under the system of the common law."

This was said in a case brought under the act of 1863, establishing the jurisdiction of the Court of Claims, which did not contain the express exclusion of cases "sounding in tort," embodied in the law of 1887.

Can there be any doubt that the plaintiffs in the cases at bar make "an attempt, under the assumption of an implied contract," to hold the Government responsible for a tort? The remedy which would, if available, have been sought is, as in the case of *Pumpelly* v. *Green Bay Company*, trespass on the case.

Moreover, the Government claims that all the acts of its officers and agents in and about the improvement of navigation of the Savannah River were lawfully done under the power granted in the Constitution to regulate commerce, and that whatever damage or injury was done, by reason of those acts, to the shore lands, the lands between high-water mark and low-water mark, was done by virtue of the paramount right of the United States, to which the right and interest of the plaintiffs were subject, and for which the United States was not liable to make compensation.

This claim was made throughout the whole of the proceedings in the circuit court, and in various forms its denial is assigned for error.

This matter was fully considered in *Hill* v. *United States* (149 U. S., 593). That was a case against the United States, for use and occupation, for a lighthouse, of submerged land, the title to which, and the exclusive right to build thereon, were asserted by the plaintiff. The defendant pleaded that the land referred to and described in the petition is submerged land and part of the bottom of the Chesapeake Bay, one of the navigable waters of the United States, and that the defendant, under the law, for the purposes of a lighthouse, has a paramount right to its use as against the plaintiff or any other person. To this plea the plaintiff demurred, the court overruled the demurrer and gave judgment for the United States.

Mr. Justice Gray, in delivering the opinion of this court, said:

> In *Langford* v. *United States* (101 U. S., 341), it was accordingly adjudged that when an officer of the United States took and held possession of land of a private citizen, under a claim that it belonged to the Government, the United States could not be charged upon an implied obligation to pay for its use and occupation.
>
> It has been since held that if the United States appropriates to a public use land which they admit to be private property, they may be held, as upon an implied contract, to pay its value to the owner. (*United States* v. *Great Falls Manuf. Co.*, 112 U. S., 645, and 124 U. S.,

581.) It has likewise been held that the United States may be sued in the Court of Claims for the use of a patent for an invention, the plaintiff's right in which they have acknowledged. (*Hollister* v. *Benedict Manuf. Co.*, 113 U. S., 59; *United States* v. *Palmer*, 128 U. S., 262.) But in each of these cases the title of the plaintiff was admitted, and in none of them was any doubt thrown upon the correctness of the decision in *Langford's case.* (See *Schillinger* v. *United States*, 24 C. Cls. R., 278.)

The case at bar is governed by *Langford's case.* It was not alleged in this petition, nor admitted in the plea, that the United States had ever in any way acknowledged any right of property in the plaintiff as against the United States. The plaintiff asserted a title to the land in question, with the exclusive right of building thereon, and claimed damages of the United States for the use and occupation of the land for a light-house. The United States positively and precisely pleaded that the land was submerged under the water of Chesapeake Bay, one of the navigable waters of the United States, and that the United States, "under the law, for the purpose of a light-house, has a paramount right to its use as against the plaintiff or any other person;" and the plaintiff demurred to this plea. The circuit court, instead of rendering judgment for the United States upon the demurrer, should have dismissed the suit for want of jurisdiction.

Nor is the standing of the plaintiffs made any stronger by adverting to the language of the act of

1887, as giving jurisdiction of "all claims founded upon the Constitution of the United States." This court, by Mr. Justice Brewer, said, speaking of this provision, in *Schillinger* v. *United States* (155 U. S., 163, 168):

> But that does not include claims founded upon torts any more than "all claims founded upon any law of Congress" found in the prior act. The identity of the descriptive words excludes the thought of any change.
>
> It is said that the Constitution forbids the taking of private property for public uses without just compensation; that therefore every appropriation of private property by any official to the uses of the Government, no matter however wrongfully made, creates a claim founded upon the Constitution of the United States and within the letter of the grant in the act of 1887 of the jurisdiction to the Court of Claims. If that argument be good, it is equally good applied to every other provision of the Constitution as well as to every law of Congress. This prohibition of the taking of private property for public use without compensation is no more sacred than that other constitutional provision that no person shall be deprived of life, liberty, or property without due process of law. Can it be that Congress intended that every wrongful arrest and detention of an individual, or seizure of his property by an officer of the Government, should expose it to an action for damages in the Court of Claims? If any such breadth of jurisdiction was contemplated, language which had already been given a restrictive meaning would clearly have been avoided.

> It is true also that to jurisdiction over claims founded "upon any contract, expressed or implied, with the Government of the United States," is added jurisdiction over claims "for damages, liquidated or unliquidated," but this grant is limited by the provision "not sounding in tort." This limitation, even if qualifying only the clause immediately preceding, and not extending to the entire grant of jurisdiction found in the section, is a clear indorsement of the frequent ruling of this court that cases sounding in tort are not cognizable in the Court of Claims.

This language is equally applicable to the district and circuit courts of the United States, which were given concurrent jurisdiction with the Court of Claims to hear and determine claims against the Government, with limitations as to amounts.

The cases at bar are certainly cases "sounding in tort." The petitions state such a case unmistakably. The transactions, as alleged, "exclude all idea of a contract."

In the findings of fact, (and they are substantially the same in both cases), in the *Lynah case*, it is said:

> A certain parcel of this plantation, measuring about 420 acres, had been reclaimed by drainage and had been in actual continued use for seventy years and upward as a rice plantation, used solely for this purpose. This rice plantation was dependent for its irrigation upon the waters of the Savannah River, and its ditches, drains, and canals, through and by

> which the waters of the river were flowed in and upon the lands and were then drained therefrom, were adapted to the natural level of the said Savannah River, and dependent for their proper drainage and cultivation upon the maintenance of the natural flow of the said river in, through, and over its natural channel along its natural bed to the waters of the ocean.
>
> This portion of the plantation dedicated to the culture of rice was protected from the river by an embankment, etc.

It is true that these lands have been reclaimed. It is true they have been reclaimed at much labor and expense, to the credit of the enterprising citizen and to the profit and honor of the Commonwealth. But this is a different kind of reclamation from that which made "the passage near the town of Lymington near the bridge," in the harbor of Portsmouth, or the reclamation of the mud flats of Massachusetts and New Jersey, or the filled-in lands in Lake Michigan and the Bay of San Francisco. All these lands, whether embanked or filled in, were permanently protected from the action of the waters. Where they were submerged lands or shore lands their character was changed. They became *terra firma*. Nobody going in under a grant and having possession for seventy years *could be removed*.

But these lands were not so reclaimed. They were only temporarily relieved from the action of the ordinary tides. Their relation to the Savannah River was only interrupted, not destroyed. In this connection,

see *Davidson et al.* v. *Boston & Maine R. R.* (3 Cush., 91, 105).

It can not be gainsaid that it was legitimate, proper, wise, and fully within their authority, for the State or the United States to improve the navigability of this river. Increasing the depth of water, whether by dredging the bottom or raising the level of the river, was of first importance. In effecting that object, in a proper manner, could the Government be hampered or controlled by those having the shore in possession, even by proper grant? Was it not rather incumbent upon those in possession to protect their possession?

II.

THE TITLE OF PLAINTIFFS TO THESE LANDS

It seems to be contended by counsel for defendants in error that the title to the shore in the Crown or the State was different from the title in submerged lands; but this is not so.

> Below this ordinary high-water mark down to the low-water mark, i. e., between the ordinary high and low water marks, lies the *shore* or *littus maris*. This shore, throughout the coasts of England, as well of the sea as of creeks and tide rivers, doth, *de jure communi*, belong to the King. In this respect, as matter of title, it would seem to be part of the *fundum*, or sea bottom, which, as before said, belongs also to the King. (Hall on Seashore, 13.)
>
> And this right of the sovereign extends to ordinary high-water mark, so that the shore,

> which is the space between high-water and low-water mark, belongs also to the sovereign.
>
> * * * * *
>
> So that by virtue of the grant from the Plymouth Company, the charter of King Charles, and actual possession and disposition of it, the people of the colony, in their politic capacity, succeeded to all the territorial rights, franchises, and immunities which had ever belonged to the sovereign power of the parent country. (*Commonwealth* v. *Charlestown*, 1 Pick., 130, 132, 133.)
>
> When the Crown conveys to private individuals the legal title to the shore, they become entitled to exercise such acts of ownership there as the Crown itself could have done, and no more; the proprietary rights in the beach thus acquired by them are therefore subordinate to the general interests of the public. (Phear on Water Rights, 46.)

There is no disguise in the attempt to bring these cases, not only within the principles, but within the circumstances, of the case of *Pumpelly* v. *Green Bay Co.* (*supra*). The allegation of the petitions and the findings of the court, and the conclusions of law reciting those findings, are all based upon that case.

But the *Pumpelly case* was a suit in trespass. It was not brought under the act of March 3, 1887. The United States was not the defendant.

The superimposed materials upon the lands of the plaintiff destroyed the natural condition of the land, and completely wiped out an indefeasible estate. And the court decided that was a taking within the provi-

sion of the Constitution, for which the defendant was bound to make compensation in the action brought.

So was the case of *Eaton* v. *The Boston, &c., R. R.* (51 N. H., 504).

And these cases are entirely different in all the particulars we have mentioned from *United States* v. *Monongahela Nav. Co.* (148 U. S., 312); *Kaukauna Water Power Co.* v. *Green Bayou Co.* (142 U. S., 254), and the other cases cited by the learned counsel for defendants in error.

Respectfully submitted.

ROBERT A. HOWARD,
United States Special Assistant Attorney.

JOHN K. RICHARDS,
Solicitor-General.

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In the Supreme Court of the United States.

OCTOBER TERM, 1902.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
ARTHUR LYNAH ET AL. } No. 45.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
CHARLES A. WILLIAMS AND AMELIA S. WILLIAMS. } No. 59.

SUPPLEMENTAL BRIEF OF PLAINTIFF IN ERROR OF AUTHORITIES RELIED UPON.

In the Supreme Court of the United States.

OCTOBER TERM, 1902.

THE UNITED STATES, PLAINTIFF IN ERROR, v. ARTHUR LYNAH ET AL. — No. 45.

THE UNITED STATES, PLAINTIFF IN ERROR, v. CHARLES A. WILLIAMS AND AMELIA S. Williams. — No. 59.

SUPPLEMENTAL BRIEF OF PLAINTIFF IN ERROR OF AUTHORITIES RELIED UPON.

ON QUESTION OF JURISDICTION.

Mr. Keener, in his work on Quasi Contracts, pages 159, 160, 161, writing of the waiver of tort, lays down these propositions:

> If anyone, in the commission of a tort, enriches himself by taking or using the property of another, the latter may in some cases, instead of suing in tort to recover damages for the injury done, sue in assumpsit to recover the value of that which has been tortiously taken or used. The remedies in tort and assumpsit not being concurrent, a plaintiff is compelled to elect which remedy he will pursue, and if he

elect to sue in assumpsit he is said to waive the tort. The doctrine of waiver of tort is simply a question of the election of remedies. Said Allen, J., in *Cooper* v. *Cooper:*

"The same act or transaction may constitute both a cause of action in contract and in tort, and a party may have an election to pursue either remedy, and in that sense may be said to waive the tort and sue in contract. But a right of action in contract can not be created by waiving a tort, and the duty to pay damages for a tort does not imply a promise to pay them upon which assumpsit can be maintained."

Assuming a defendant to be a tort feasor, in order that the doctrine of waiver of tort may apply, the defendant must have unjustly enriched himself thereby. That the plaintiff has been impoverished by the tort is not sufficient. If the plaintiff's claim, then, is in reality to recover damages for an injury done, his sole remedy is to sue in tort.

And in support of these propositions, among other authorities, he quotes Judge Rapallo, of the supreme court of New York, in *National Trust Co.* v. *Gleason* (77 N. Y., 400):

To maintain such an action, it is necessary to establish that the defendants have received money belonging to the plaintiff or to which it is entitled. That is the fundamental fact upon which the right of action depends. It is not sufficient to show that they have by fraud or wrong caused the plaintiff to pay money to others, or to sustain the loss or damage. That is not the issue presented in the action.

And, as bearing upon both the denial of the title in the defendant and the doctrine of enrichment, reference is here made to what was said by Mr. Justice Harlan, in delivering the opinion of the court in *United States* v. *Great Falls Manufacturing Co.* (112 U. S., 657):

> The case is materially different from *Langford* v. *United States* (101 U. S., 341). That was an action in the Court of Claims against the United States to recover for the use and occupation of certain lands and buildings to which the claimant asserted title. It there appeared that, throughout the whole period of such occupation and use, the title of the claimant was disputed by the Government, and that the possession was taken and held by its agents in virtue of a title asserted to be in the United States. The jurisdiction of the Court of Claims was attempted to be sustained upon the ground that the Government, in taking and using the property of an individual against his consent and by force, could not, under the relations between it and the citizen, commit a tort, but was under an implied obligation, created by the Constitution, to pay for the property or for the use of the property so taken. This proposition was held to be untenable under the facts of that case for the reason that while individual officers of the Government might be guilty of a tort if the property *so held* by them was in fact private property, yet if the Government never recognized the property as private property, taken by its agents for public use, it could not be held liable for its value as upon implied contract.

And also in *Great Falls Manufacturing Co.* v. *Attorney-General* (124 U. S., 597):

> In reference to the allegation that the survey and map made by the Secretary were not sufficiently accurate, and that the notice published by the Attorney-General was materially defective, it may be further said that all such objections were waived by the company when, proceeding under the act of 1882, it invoked the jurisdiction of the Court of Claims to give judgment against the United States for such compensation as it was entitled to receive for its land and water rights. Even if the Secretary's survey and map and the publication of the Attorney-General's notice did not, in strict law, justify the former in taking possession of the land and water rights in question, it was competent for the company to waive the tort, and proceed against the United States, as upon an implied contract, it appearing, as it does here, that the Government recognizes and retains the possession taken in its behalf for the public purposes indicated in the act under which its officers had proceeded.

II.

As to the necessity on the part of the United States to make compensation for injury or damage to the shore or flat lands under the claim that they are private property taken for public uses.

In the case of *Shively* v. *Bowlby* (152 U. S., 1), which is a leading case, Mr. Justice Gray, in an elaborate and exhaustive opinion, reviews and states the law, as

it obtains at the common law and in the States and Territories of the Union, upon the title to the soil of the sea and arms of the sea and shores and flats. The review of the authorities is complete and thorough, and the conclusions, so ably and synthetically stated, are relied upon to support the position of the plaintiff in error here.

It is held, *inter alia*, that the title and rights of riparian or littoral proprietors in the soil between high-water mark of navigable waters are governed by the local laws of the several States, subject, of course, *to the rights granted to the United States by the Constitution* (p. 40.)

In *Hardin* v. *Jordan* (140 U. S., 371), Mr. Justice Bradley, in the opinion of the court, said:

> With regard to the grants of the Government for lands bordering on tide water, it has been distinctly settled that they only extend to high-water mark, and that the title to the shore and lands under water in front of lands so granted inures to the State within which they are situated, if a State has been organized and established there. Such title to the shore and lands under water is regarded as incidental to the sovereignty of the State—a portion of the royalties belonging thereto, and held in trust for the public purposes of navigation and fishery—and can not be retained or granted out to individuals by the United States.
>
> Such title being in the State, the lands are subject to State regulation and control, under the condition, however, of not interfering with

> the regulations which may be made by Congress with regard to public navigation and commerce. The State may even dispose of the usufruct of such lands, as is frequently done by leasing oyster beds in them, and granting fisheries in particular localities; also, by the reclamation of submerged flats, and the erection of wharves and piers and other adventitious aids of commerce. Sometimes large areas so reclaimed are occupied by cities, and are put to other public or private uses, State control and ownership therein being supreme, subject only to the paramount authority of Congress in making regulations of commerce and in subjecting the lands to the necessities and uses of commerce. This right of the States to regulate and control the shores of tide waters and the land under them is the same as that which is exercised by the Crown in England.

In *Hoboken* v. *Penn. R. R. Co.* (124 U. S.) Mr. Justice Matthews, delivering the opinion of the court, said (p. 688):

> In the examination of the effect to be given to the riparian laws of the State of New Jersey by the act of April 11, 1864, in connection with the supplementary act of March 31, 1869, it is to be borne in mind that the lands below high-water mark, constituting the shores and submerged lands of the navigable waters of the State, were, according to its laws, the property of the State as sovereign. Over these lands it had absolute and exclusive dominion, including the right to appropriate them to such uses as might best serve its views of the public interest,

subject to the power conferred by the Constitution upon Congress to regulate foreign and interstate commerce. The object of the legislation in question was evidently to define the relative rights of the State, representing the public sovereignty and interest, and of the owners of land bounded by high-water mark. The regulations to this end had in view a definite and permanent demarcation of the line in the water, beyond which there should be no obstructions or impediments to the public right of navigation. They also contemplated, as of equal importance, the manner in which and the persons by whom the intermediate space between those exterior lines and the original high-water mark should be filled up, reclaimed, occupied, and used, so as to make the enjoyment of such property most valuable to private and public interests involved in the public right of navigating the water. It was for this reason that this space was made the subject of grants by the State to corporations and other persons who were riparian owners adjacent thereto, with authority to erect or build thereon docks, wharves, and piers; and that prior grants of a similar character under legislative authority were confirmed and perpetuated. It was for that reason that in the grant to the united companies this right and privilege of erecting and making wharves, piers, and other improvements was declared to be "so that they may safely make such improvements as they may find necessary to facilitate their business." For the same reason it was declared in the act of March 31, 1869, that the

conveyance or lease of the commissioners under the act should not merely pass the title to the land therein described, but the right to reclaim and fill in and otherwise improve the same, and "to appropriate the lands to exclusive private uses."

* * * * *

It was, therefore, held in that case (*Stevens* v. *Patterson, etc.*, 5 Broom, 532) that it was competent for the legislative power of the State to grant to a stranger lands constituting the shore of a navigable river under tidewater, below the high-water mark, to be occupied and used with structures and improvements in such a manner as to cut off the access of the riparian owner from his lands to the water, and that without making compensation to him for such loss. The act of March 31, 1869, as we have seen, afterwards secured to the riparian owner the option of purchasing from the State its title to the shore, or, if granted to a stranger, compensation for the value of his privilege.

The title to lands under tide water, within the realm of England, were, by the common law, deemed to be vested in the King as a public trust, to subserve and protect the public right to use them as common highways for commerce, trade, and intercourse. The King, by virtue of his proprietary interest, could grant the soil so that it should become private property, but his grant was subject to the paramount right of public use of navigable waters, which he could neither destroy nor abridge. In every such grant there was an implied reser-

vation of the public right, and so far as it assumed to interfere with it or to confer a right to impede or obstruct navigation, or to make an exclusive appropriation of the use of navigable waters, the grant was void. In his treatise, De Jure Maris, Lord Hale says: "The *jus privatum* that is required by the subject, either by patent or prescription, must not prejudice the *jus publicum* wherewith public rivers and the arms of the sea are affected to public use;" and Mr. Justice Best, in *Blundell* v. *Caterall*, 5 Barn. & Ald., 268, in speaking of the subject, says: "The soil can only be transferred subject to the public trust, and general usage shows that the public right has been excepted out of the grant of the soil."

The principle of the common law to which we have adverted is founded upon the most obvious principles of public policy The sea and navigable rivers are natural highways, and any obstruction to the common right, or exclusive appropriation of their use, is injurious to commerce, and, if permitted at the will of the sovereign, would be very likely to end in materially crippling, if not destroying it. The laws of most nations have sedulously guarded the public use of navigable waters within their limits against infringements, subjecting it only to such regulation by the State, in the interest of the public, as is deemed consistent with the preservation of the public right.

People v. *N. Y. & S. I. F. Co.*, 68 N. Y., 71, 76; quoted by Mr. Justice Field in *Ills. Cen. R. R. Co.* v. *Ills.*, 146 U. S., 387, 458.

The soil under navigable waters being held by the people of the State in trust for the common use, and as a portion of their inherent sovereignty, any act of legislation concerning their use affects the public welfare. It is therefore appropriately within the exercise of the police power of the State. (*Ills. Cen. R. R.* v. *Ills.*, 146 U. S., 459.)

See also *McCready* v. *Virginia*, 94 U. S., 391, 394;
Pollard v. *Hogan*, 44 U. S., 212;
Boston v. *Lecraw*, 17 How., 426;
Com. v. *Charlestown*, 1 Pick., 180;
Com. v. *Alger*, 7 Cush., 53, 78, 79;
Rundle v. *Delaware and Raritan Canal Co.*, 14 How., 79;
Fisher v. *Haldeman*, 20 How., 186;
Phear on Waters, 52, 53.

Respectfully submitted.

ROBERT A. HOWARD,
Special Assistant Attorney.

JOHN K. RICHARDS,
Solicitor-General.

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In the Supreme Court of the United States.

OCTOBER TERM, 1902.

THE UNITED STATES, APPELLANT,
v.
ARTHUR LYNAH ET AL. } No. 45.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
CHARLES A. WILLIAMS AND AMELIA S. WILLIAMS. } No. 59.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA.

PETITION OF THE UNITED STATES FOR REHEARING.

We submit hereby the petition of the Government for rehearing in these cases. The request is made with especial earnestness, because of the unusual gravity of the main question. A vital and extensive function of the Government is involved. Its exercise is affected by fundamental challenges, or, at least, would be followed by practical consequences having the same effect in restriction and impairment. It is manifest that the result of the decision of the court will be very far-reaching; that it will influence momentously interior waters and waterways and boundary waters, as

well as coast and tidal waters throughout the length and breadth of the land.

The scope of the Government's constitutional power over commerce and navigation, and the extent of one of the most important guaranties to the people, are drawn in question by a conflict which invokes comparative scrutiny and justifies great deliberation.

We add brief observations on particular points:

First. It appears from the opinion of the court that neither in the court below nor on the first argument here was the question of jurisdiction presented or considered. The opinion intimates that this omission is significant. Without suggesting that the question has not now been carefully argued, it has only been once argued. For this reason, then, and because the point of jurisdiction is so intimately connected with the merits, we desire to present that question again to the court in more detail.

Second. Further—and this is a matter of some delicacy—the court say that the Government conceded on the argument that "so far as respects *the mere matter of overflow and injury* there was no substantial distinction" between the Pumpelly case and the present cases.

Avoiding the intimation that there was any misapprehension between court and counsel at that stage—a misunderstanding, inadvertent, of course, if it occurred—we deem it our duty to state that the United States did not intend to grant, and must now explicitly decline to make any such concession.

Third. We are aware that the opinion of the court construes the findings of fact below with determinative effect; yet it is so essential that the accuracy of the crucial fact as to the manner and extent of the "taking" should be recognized beyond all doubt that we submit as follows:

The opinion says: "But Findings IX and X show that both by seepage and percolation through the embankment and an *actual flowing upon the plantation above the obstruction* the water has been raised in the plantation about 18 inches," etc. We assume that in this passage the word "obstruction" is equivalent to "embankment," and that the phrase "above the plantation" means "over the embankment." But Finding IX merely locates the plantation as above "these obstructions," referring to the Government dams and walls lower down the river; and Finding X states that the water "has been *backed up against* the embankment;" and when it also says, "has been caused to flow back upon and in this plantation above the obstruction," the reference is again to the "obstruction" or "obstructions" of the Government works below the plantation. The undoubted finding that the "lift" above mean low water was from 12 to 15 inches necessarily requires this view, we think. We contend, therefore, with respect, that the purport of the court's finding and the fact simply is that the waterways and ditches were not drained; that the words "invaded" and "flooding" relate merely to this feature and to percolation through the

levees or embankments, and by no means imply an actual flowing upon the land over the top of the embankment, or actual submersion of the body of the property to the depth of 18 inches. See also Finding XII, which is: "beyond the *backing up* of the water on and in the plantation by reason of the dams and *obstruction*, and the *invasion* of these lands by *this* super-induced addition of water, * * * the United States is not in actual possession," etc. It seems that overflow, throughout the consideration of the cases, has been used in two or three different meanings. The overflow of land and of embankment are entirely different things.

Having in mind the foregoing considerations, we suggest that additional argument before all the justices is eminently proper and, indeed, necessary. We therefore ask with all becoming urgency, on behalf of the United States, for an opportunity to argue again the important questions in issue.

P. C. KNOX,
Attorney-General.
HENRY M. HOYT,
Solicitor-General.

We hereby certify that in our opinion the foregoing petition states a correct distinction under the findings of fact, and is therefore well founded in point of law.

P. C. KNOX,
Attorney-General.
HENRY M. HOYT,
Solicitor-General.

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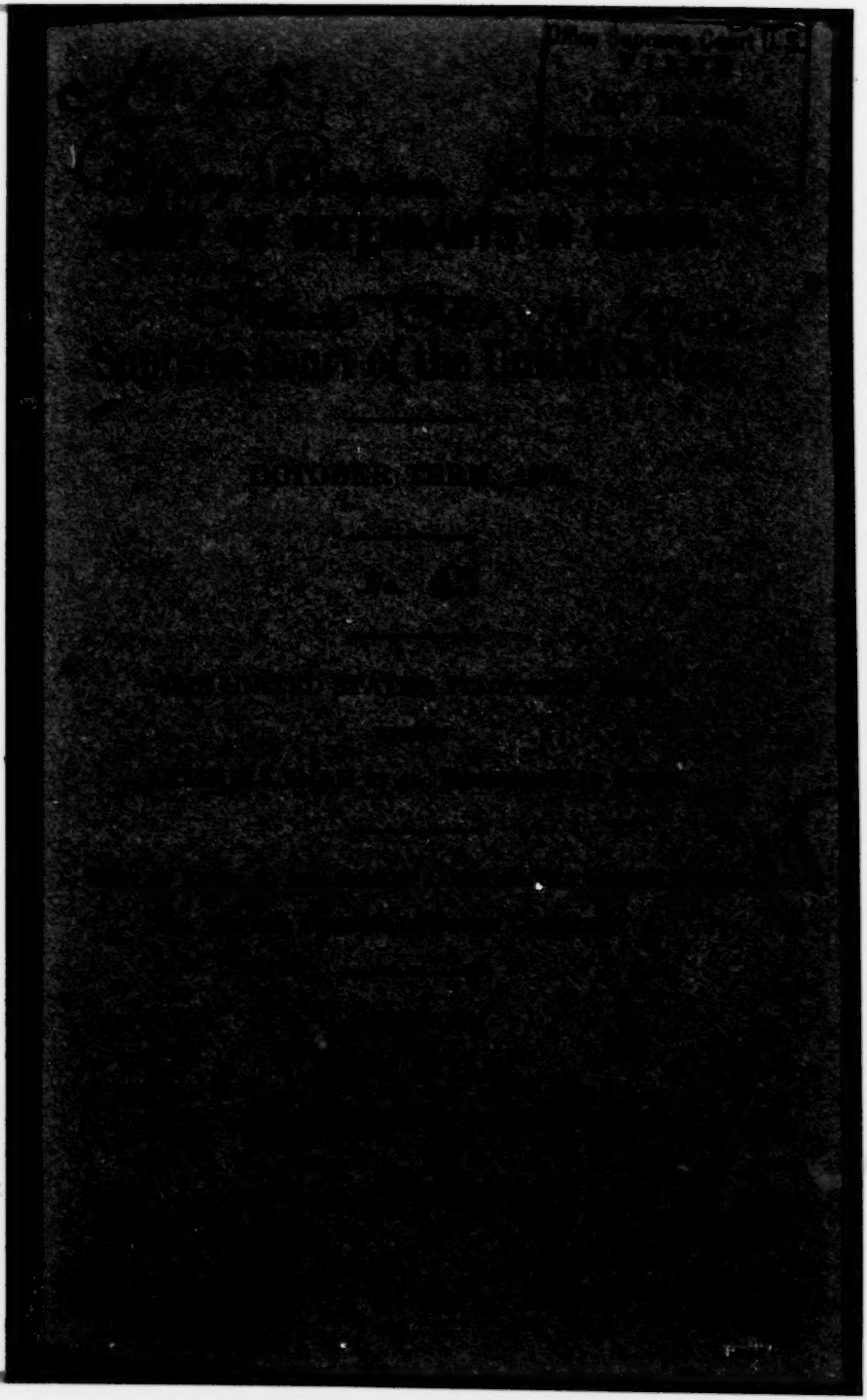

BRIEF OF DEFENDANTS IN ERROR.

Supreme Court of the United States.

OCTOBER TERM, 1902.

No. .

THE UNITED STATES, PLAINTIFF IN ERROR,

against

ARTHUR LYNAH ET AL., DEFENDANTS IN ERROR.

WRIT OF ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA.

BRIEF OF

J. P. K. BRYAN,

Counsel for Defendants in Error.

STATEMENT OF THE CASE.

This is an action by the plaintiffs, owners of a rice plantation, against the United States on "an implied contract," and on a "claim arising under the Constitution of the United States," for value of property, such rice plantation, taken by the United States for public use, just compensation for which is due to the plaintiff under Fifth Amendment of the Constitution of the United States.

This case is brought under the Act of Congress of 3 March, 1887, 24th Stat. at Large, page 505, wherein it is provided that persons may bring suit against the United States by section 1st therein "on all claims against the United States founded upon the Constitution of the United States or any law of Congress," or "upon any contract, express or implied, with the Government of the United States," in respect to which claims the party would be entitled to redress against the United States, either in a court of law and equity or admiralty, if the United States were suable, etc. By Section 2 of the Act, the Circuit Court of the United States was given jurisdiction if the amount of such claim does not exceed ten thousand dollars. All causes brought and tried under the provision of this Act shall be tried by the Court without a jury.

Section 7 makes it a duty of the Court to deliver a written opinion to be filed in the case, setting forth the *specific findings by the Court of the facts therein* and conclusions of the Court upon all questions of law involved in the case, and to render judgment thereon.

Section 9 provides for the right of appeal or writ of error, as are now reserved in the Statutes of the United States under the conditions and limitations therein contained.

PLEADINGS.

The *Petition* and *Complaint* in this case avers (Transcript of Record, pp. 1-3):

"First. That the plaintiffs, your petitioners, are citizens of the United States, and reside as follows: Plaintiffs Arthur Lynah, J. H. Lynah, Edward Lynah, Emma P. Lynah, Jane L. Lynah, Susan N. Lynah, now reside in State and District of South Carolina; plaintiff James Lynah resides in the State of Maryland; plaintiffs Marie Glover Jenkins (born Lynah) and Kate McD.

Cunningham (born Lynah) and Anne McD. Hopkins (born Lynah) reside in the State of Georgia.

"Second. That your petitioners have a claim against the United States of America under an implied contract for compensation for the value of property taken by the United States for public use, as hereinafter stated and alleged.

"Third. That your petitioners were at the times hereinafter mentioned, and now are, owners as tenants in common of a certain plantation situated in the County of Beaufort, State of South Carolina, described as follows: "All that plantation or tract of land called Vernezobre, situate, lying and being on the Savannah River, in Saint Peters Parish, Beaufort District, and State aforesaid, butting and bounding to the north on land of the late John M. Chisolm and Elliott Guerard; to the east on lands formerly of Brisbane; to the west on Savannah River, lands of Elliott Guerard and Daniel Heyward, Esq.; to the south on lands of Daniel Heyward, Elliott Guerard and Pringle Smith, Esqs., measuring and containing two thousand one hundred (2,100) acres, more or less. *A certain tract or parcel of which said plantation, containing four hundred and twenty (420) acres, more or less, which is delineated on a map of said plantation and enclosed within red lines, hereto annexed and made part of this complaint, has been for seventy years and upwards a rice plantation on the Savannah Back River, with great labor and expenditure of money reclaimed and established and maintained as a plantation solely for the cultivation of rice, adapted thereto by the level of the lands thereof in relation to the natural level of the waters of the said Savannah River,* and depending for its proper drainage and cultivation upon the maintenance of the natural flow of the said Savannah River, in, through and over its natural channel along its natural bed to the waters of the Atlantic Ocean.

"Fourth. That for several years continuously and now continuously, the said Government of the United States of America, in the exercise of its power of eminent domain under the Constitution of the United States and by authority of the Acts of Congress, duly empowering its officers and agents thereto, in that case made and provided, did erect, build and maintain, and continuously since have been erecting, building and maintaining, and are now building, erecting and maintaining in and across the said Savannah River, in the bed of the said Savannah River, certain dams, training walls, and other obstructions, obstructing and hindering the

natural flow of the said Savannah River through, in and along the natural bed thereof and raising the said Savannah River feet at the point of and above the said obstructions and dams in the bed of the said Savannah River, and causing the said waters of the Savannah River aforesaid to be kept back and to flow back and to be raised and elevated above the natural height of the Savannah River along its natural bed at the points of the said dams, training walls and obstructions, and at points above the said dams, training walls and obstructions in said river.

"Fifth. That the said dams, training walls, and obstructions have been and are being erected and maintained in the bed of said river at a great height at divers places in said river, below the said plantation of your petitioner.

"Sixth. That the effect of the said dams, training walls and obstructions in said Savannah River upon the said four hundred and twenty acres, being of rice lands, portions of the said plantation of your petitioners, commonly known as "Verzenobre," *is that it backs the waters of the Savannah River in and upon the said plantation, and it raises and forces back the waters of the Savannah River at, in and around and upon the said plantation to the height of about two feet over and above the natural and ordinary level of the said Savannah River, existing at, in and around the said plantation at the time of its establishment as a rice plantation, and previous to the erection and maintenance of the said obstructions, training walls and dams by the United States,* and thus preventing the natural outflow of water from the said plantation necessary for its purpose of drainage and cultivation of said four hundred and twenty (420) acres, lands of said plantation, and preventing the established and proper inflow and outflow of the waters of the Savannah River necessary to the cultivation of the said four hundred and twenty acres (420) acres of lands of said plantation as a rice plantation, and *further filling the ditches and saturating the lands with water* and preventing the outflow of water from the said "Verzenobre" plantation and *submerging and destroying the crops of and preventing the drainage of the said four hundred and twenty (420) acres of lands of said plantation for cultivation for any purpose whatsoever,* and that *by the said superinduced additions of water actually invading the said rice lands of said plantation, the said four hundred and twenty (420) acres of said plantation is permanently injured and effectually destroyed.*

"Seventh. And your petitioners further show that the said acts of the Government of the United States, as aforesaid, have been done and are being done lawfully by the officers and agents of the United States under the authority of the *United States in the exercise of its powers of eminent domain and regulation of commerce under the Constitution of the United States* and the laws of Congress for the public purpose of the improvement of the harbor of Savannah and deepening the waters of the river at the port of Savannah, a port of entry of the United States and sea port of the United States of America, situated within the State of Georgia, on the Savannah River, and with the purpose of deepening and enlarging the navigable channel and highway for commerce of the said Savannah River *for the public use, purpose and benefit of interstate and foreign and international trade and commerce*, and for other public purposes, uses and benefits.

"Eighth. The plaintiffs, petitioners, further show and allege that by reason of the premises there is due and owing unto the plaintiffs, petitioners, by the United States for and in consideration of the facts hereinbefore alleged and the *taking* by the United States of the said four hundred and twenty acres, as aforesaid, of the said plantation for public uses and purposes, as in the manner and form hereinbefore alleged, the sum of ten thousand dollars ($10,000), the value of and lawful compensation for such property so taken as aforesaid.

"Wherefore, the plaintiffs, petitioners, pray judgment against the United States of America for the sum of ten thousand dollars ($10,000)."

Transcript of Record, pp. 1-3.

ANSWER.

The answer of defendant, the United States, in so far as the same is material to the legal questions raised here by the plaintiff in error, is a denial of the allegations of the complaint, "except so much of the fourth paragraph as alleges that the said United States heretofore erected certain dams in the Savannah River, pursuant to power vested in it by law, and except so much of the seventh paragraph as alleges that the said dams heretofore erected by the United States were lawfully erected by its officers and agents."

Transcript of Record, page 5.

The cause was heard by the Circuit Court of the United States on the pleadings and testimony and proofs and argument of counsel, and the Court, under the provisions of the Act of Congress, filed the following *"Findings of Fact"* and *"Conclusions of Law."*

Page 6, Transcript of Record.

JUDGMENT OF THE COURT.

"This is a proceeding under the Act of Congress, March 3, 1887, giving this Court co-ordinate jurisdiction with the Court of Claims in certain causes of action against the Unted States. The object of the proceedings is to obtain just compensation for certain lands alleged to have been taken by the Government for public purposes. The cause of action in on the implied contract arising from such alleged taking to give just compensation therefor, under the fifth amendment.

"The cause being at issue was tried by the Court, in accordance with the Act of Congress, without the aid of a jury.

FINDINGS OF FACT (PP. 6-9, TRANSCRIPT).

"I. The above petition was in compliance with the requirements of Act of March 3d, 1887, chapter 359, duly filed in the Clerk's office, Circuit Court of the United States for the District of South Carolina, on the 4th day of February, 1897, and copies thereof duly served on the United States District Attorney and the Attorney General of the United States, and said law in all respects complied with.

"II. The plaintiffs, Arthur Lynah, J. H. Lynah, Edward Lynah, James Lynah, Emma P. Lynah, Jane L. Lynah, Susan M. Lynah, Kate McD. Cunningham, Marie Glover Jenkins, Annie McD. Hopkins, are the children and sole heirs at law and distributees of Edward Lynah, deceased.

"III. Edward Lynah, the father of the plaintiffs, at the time of his death, and for many years previous thereto, was the owner in fee simple of a plantation on Savannah River, in the State of South Carolina, known as Vernezobre, containing about 2,100 acres of high land and rice land. He held this plantation under sundry successive mesne conveyances connecting his title with a grant of the said land by the lord proprietors of South Carolina in 1736.

"IV. A certain parcel of these plantations, measuring about 420 acres, had been reclaimed by drainage and had been in actual continued use for seventy years and upwards as a rice plantation, used solely for this purpose. This rice plantation was dependent for its irrigation upon the waters of the Savannah River and its ditches, drains and canals, through and by which the waters of the river were flowed in and upon the lands, and were then drained therefrom, were adapted to the natural level of the said Savannah River, and dependent for their proper drainage and cultivation upon the maintenance of the natural flow of the said river in, through and over its natural channel along its natural bed to the waters of the ocean.

"V. This portion of the plantation fronting on the river and dedicated to the culture of rice, extended almost up to if not quite to low water mark, and a large part of it was between mean high water and low water mark, protected from the river by an embankment. (See amendment to fifth finding of fact, p. 16, fol. 32, Record.) Through this embankment trunks or waterways were constructed, with flood gates therein. The outer opening of the trunk was about a foot or a little less above the mean low water mark of the river, in which the tide ebbs and flows. When it is desired to flow the lands the flood gates are opened and the water comes in. When it is desired to draw off this water and to effect the drainage of the lands, the flood gates are opened at low water and the water escapes. It is essential that the outlets of the trunks or waterways should always be above the mean low water mark.

"VI. These lands were granted by the lords proprietors of Carolina in 1736, and lie on the Savannah Back River, a *tidal fresh water stream*, and are adapted by relation to their level to the cultivation of rice, under the natural flow of the Savannah River along its natural bed to the sea. *The whole rice culture of South Carolina is founded upon this system*, and the *policy of the colony and the State has been to grant such lands for rice culture;* and, inasmuch as it is necessary to have the lands absolutely dry to prepare the same for planting and to plant the rice crop, which is afterwards flowed while the rice is growing, and again dry while the rice is being harvested, the State has, by severe penal laws, for one hundred and fifty years protected such rice lands from destruction by continual inundation by backing up water or keeping surplus water on the lands by stopping the course of any water in

its natural flow. (Revised Statutes of South Carolina, secs. 1264 to 1267).

"It appears from the plats among the muniments of plaintiff's title that these *rice lands were reclaimed and enclosed and in a state of culture one hundred and twenty years ago,* and *probably longer.*

"VII. For several years last past and at the present time the Government of the United States, under its proper officers, authorized thereto by the Act of Congress, have been engaged in the improvement of the navigation of the Savannah River, a navigable water of the United States, this improvement being carried on by virtue of the provisions of Section 8, Article I., of the Constitution, giving to the Congress the power to regulate commerce.

"VIII. In thus improving navigation of this navigable water, the United States has built and maintained and is now building and maintaining in and across the Savannah River, in the bed thereof, *certain dams,* training walls, and other obstructions, *obstructing the natural flow of said river in and along its natural bed, and so raising the level of said river above said obstructions* and causing *its waters to be kept back and to flow back and to be elevated above its natural height* in its natural bed.

"IX. This rice plantation, Vernezobre, is above these obstructions. *The direct effect* thereof *is to raise the level of the Savannah River at this plantation* and to *keep the point of mean low water above its natural point,* so that the outlet of the trunks and waterways above spoken of in the bank of said plantation, instead of being above this point of low water mark, is now below this point. *Another direct result* was that by seepage and percolation the water rose in the plantation until the water level in the river and the superinduced addition of water in the plantation was about eighteen inches thereby. By reason of this it gradually became difficult, and has now become impossible, to let off the water on this plantation or to drain the same, so that these acres dedicated to the cultivation of rice have become boggy, unfit for cultivation and impossible to be cultivated in rice.

"X. *By the raising of the level of the Savannah River by these dams and obstructions, the water thereof has been backed up against the embankment on the river and has been caused to flow back upon and in this plantation* above the obstruction, and has *actually invaded said plantation, directly raising* the water in *said*

plantation about eighteen inches, which it is impossible to remove from said plantation. This flooding is the permanent condition now, and the rice plantation is thereby practically destroyed for the purpose of rice culture or any other known agriculture, and is an irreclaimable bog, and has no value.

"XI. *By reason of this superinduced addition of water actually invading the said rice plantation and its destruction thereby for all purposes of agriculture, plaintiffs have been compelled to abandon the cultivation of said rice plantation, and have been forced to pursue their calling of planting rice on other plantations below the dams. The direct result to plaintiffs is an actual and practical ouster of possession from this rice plantation, cultivated by themselves and family for many years.*

"XII. Beyond the backing up of the water on and in the plantation by reason of the dams and obstruction, *and the invasion of these lands by this superinduced addition of water at and in the plantation*, as above described, *rendered necessary by the execution of the Government's plans*, the United States is not in actual possession of these lands.

"XIII. Up to this time no other use has been discovered for these lands than for rice cultivation, *and the direct results above stated have actually destroyed the market value of the lands. They now have no value.*

"XIV. The value of these rice lands before the obstructions aforesaid were put into the river, was about thirty dollars per acre, between twenty-five and thirty dollars per acre. *The value* of the *rice plantation, 420 acres, thus destroyed, is ten thousand dollars.*

"XV. The dams and obstructions built in Savannah River by the Government of the United States, were, for several years being continuously erected, the height of the water gradually being increased, and the injury to the plantations gradually progressing, destroying its cultivation in successive fields. *Its greatest height was reached about 1895*, and within six years of the commencement of this action. The gradual effect of the dams and obstructions and jetties did not result in a *final condition of complete destruction and an enforced abandonment of this rice plantation and practical and actual ouster of plaintiffs until 1895*, and within six years of the commencement of this action."

Pp. 6-9, Transcript.

The Court further says, at p. 15, fol. 30:

"The finding of facts shows that the plaintiffs and their ancestors had been in actual exclusive *pedis possessio* of all this land, high land and rice land, down to the embankment of the river at low water mark, holding under a grant from the English crown. This long continued, actual adverse possession would give a complete title as against the world."

P. 15, Transcript Record.

The provisions of the Acts of 1744, 1783, 1785 and 1786, referred to by the Court in its sixth finding of fact, are contained in the Revised Statutes of South Carolina of 1882, 1893 and 1902, being a part of the statute law of the Colony and of the State for one hundred and fifty years.

Dams must not be erected or water let off to the injury of others.

1744, III., 609, sec. 1; 1783, IV., 540, sec. 1.

Section 1264 (1169). No person shall be permitted or allowed to make or keep up any dams or banks to stop the course of any waters so as to overflow the lands of another person without the consent of such person first had and obtained; nor shall any person be permitted or allowed to let off any reserved water to injure the crops upon the grounds of other persons.

Revised Stat. S. C. (1893), p. 435. See cases cited.

Section 1265 (1170). Every person who shall keep water during the winter upon grounds on which *rice* is to be planted the ensuing spring, shall, on the tenth day of March, in each year, open the dams which keep up the water in a sufficient manner for letting the same; and if any person shall neglect so to do on or before the time aforesaid, he shall forfeit and pay the sum of five hundred dollars for every such neglect, to be recovered upon the complaint of any person through whose land such water may pass; and it shall and may be lawful for such person to sue for the same in any Court of competent jurisdiction in the county where such offense is committed, and the one-half thereof shall be paid to the informer, and the other half to the use of the poor of such county.

Revised Stat. S. C. (1893), p. 436.

Mode of obtaining redress, if not so opened.

1744, III., 609, sec. 3; 1785, IV., 723, sec. 2.

Section 1266 (1171). Where any person has neglected to open his or her dams in sufficient manner for letting the water off the grounds before described, on or before the tenth day of March, in every year, as aforesaid, any person affected thereby may, at any time thereafter, either personally or by his agent or trustee, apply to any Trial Justice in the county for a warrant of survey. The Trial Justice shall thereupon notify the defendant of the complaint made against him, with the time and place of meeting, and summon three freeholders, disinterested persons of the neighborhood where the cause of complaint shall lie, one of whom shall be chosen by the defendant, and in case of his refusal, then by the Trial Justice, another by the complainant and the third by the Trial Justice. The freeholders thus chosen, being first sworn by such Trial Justice to determine the matter in dispute justly and impartially,

shall forthwith proceed to view the obstructions complained of, and if on view thereof, they, or a majority of them, shall be of opinion that such obstructions do or may prevent the complainant from planting his crop of *rice* in proper time, then, and in such case, the said freeholders, or a majority of them, shall cause the same to be immediately opened or removed in any way or manner they shall think necessary for the purpose of giving the most effectual relief to the party complaining, whereupon the defendant must pay all expenses attending such survey; but nothing herein shall extend, or be construed to extend, to impose any penalty on any person, or to cause his dams or banks to be opened, who shall have made through his own lands a drain or drains sufficient, in the judgment of said freeholders, to carry off the waters passing through the same as expeditiously as they could have passed through the natural course or channel in case no such banks had been erected.

Revised Stat. S. C. (1893), p. 436.

Redress for obstructing surplus water on rice grounds.

1786, IV., 728, sec. 3.

Section 1267 (1172). It shall be lawful for any person at any time between the tenth day of March and the first day of November in every year, to apply in manner aforesaid for a warrant of survey on any obstructions which he or she may conceive to impede the conveying off any surplus water on his *rice* grounds, and which, by remaining thereon, may prove any way injurious, or shall at any time hereafter make or keep up any dam or dams which shall stop the course of any water so as to overflow the lands of any person or persons whatever, without the consent of such person or persons first had and obtained, and which shall be injurious to the said person or persons, then, in either of such cases, the said Trial Justice and the freeholders by him appointed shall proceed in the same manner as is directed in the foregoing section. If, in either of the cases last mentioned, the defendant shall neglect or refuse to attend at the survey to choose a freeholder, as aforesaid, then the three freeholders who shall have been summoned by a Trial Justice shall proceed to determine the matter in dispute in the same manner as if the defendant had been present and had chosen a freeholder, which said freeholders shall, in both cases, certify to the said Trial Justice, under their hands, what shall have been by them done in the premises, the expenses attending which survey shall be paid by the party against whom the award shall be given.

Rev. Stat. S. C. (1893), p. 436-7.

Penalty for replacing obstructions for stopping up dams.

Ib., 724, sec. 4.

Section 1268 (1173). If any one, either personally or by his agent, trustee or any other person or persons acting for him, shall presume to stop up any dam or dams or replace any obstructions, in any manner whatsoever, which have been ordered to be opened and removed by any freeholders, as aforesaid, or which have been opened or removed by such person or his overseer, agent, attorney or trustee, or by order of either of them, on the said tenth day of March, until the tenth of July, every person so offending shall forfeit and pay the sum of one thousand dollars, to be recovered and disposed of in manner as provided for by Section 1265. If any person shall presume to obstruct, impede or otherwise hinder or interrupt the opening of any dam or dams, or the removing of any obstructions ordered to be opened or removed by the freeholders, as aforesaid, every person so offending shall forfeit and pay for every such

offense the sum of two thousand five hundred dollars, to be recovered and disposed of in manner aforesaid.

Rev. Stat. S. C. (1893), p. 437.

The grant of this land, as found by the Circuit Court in the third finding of fact, was repeatedly confirmed by the State of South Carolina in its several enactments of the Revised Statutes 1882, 1893 and 1902.

Section 1872 (1761). The only tenure of lands in South Carolina is that of free and common socage.

Section 1878 (1762). All and every person or persons who are now possessed of or do hold any massuages, lands, tenements or hereditaments whatsoever in the State of South Carolina, by and under any original patents, grants, deeds, indentures or poll, either made by the former lords proprietors or by their palatine or his deputy, and any three or more of the lords proprietors or their deputies or by any of their Governors, and any three or more of the said lords proprietors or the said lords proprietors' deputies, or by any other person or persons whatsoever commissioned by their palatine, and any three or more of the said lords proprietors, or by any five of the said lords proprietors, their deputies or commissioners, as of fee simple, or fee simple conditional, or for life, or for terms of years, and all other person or persons whatsoever who are now possessed of or do hold any such estate or estates, by virtue of any mesne conveyances, derived from and under all or any such original patents, grants, deeds, indented or poll, shall and may from henceforth quietly and peaceable have, hold, use, occupy, possess and enjoy all and every such messuages, plantations, lands, tenements and hereditaments whatsoever to them, their heirs, executors, administrators and assigns, respectively, according to the several tenures in such original patents, grants, deeds indented or deeds poll, and mesne conveyances or last wills, derived from under them, respectively mentioned and expressed, and that against the said State forever, and against all and every the said lords proprietors and their heirs, and all and every person and persons whatsoever, save and except as hereinafter excepted.

Rev. Stat. S. C. (1893), p. 632.

Ratification and confirmation, saving the claims of third persons.

Section 1875 (1764). All and every such patents, grants, indentures and deeds, and all other patents, grants, indentures and deeds from the said proprietors, their governors, deputies, commissioners or trustees where any lands have been so meted, or ascertained, or returned as aforesaid, and the assignments thereof, are hereby ratified and confirmed, for and notwithstanding all or any such defects in the patents, grants, deed aforesaid, or any of them, or the assignment thereof, or other defects whatsoever, in not timely executing, undue or non-execution thereof as aforesaid, saving to every person and persons whatsoever, bodies politic and corporate, their executors, administrators and assigns, other than to the State of South Carolina, and other than to the said lords proprietors and their heirs, and other than to such person and persons who do or may stand seized or possessed in trust for the said State, or for the said lords

Ib.

proprietors, all such right, title, interest and demand whatsoever which they or any of them now have and may claim of, in or to the said lands, tenements and hereditaments whatsoever, or any part thereof.

Rev. Stat. S. C. (1893), p. 634.

Upon these findings of fact, now conclusive and finally fixed as the ultimate facts in this Court, the Circuit Court of United States found the following:

CONCLUSIONS OF LAW.

"I. The cause of action accrued within six years of the commencement of this action.

"II. The Government of the United States, in undertaking this improvement of the navigation of the Savannah River, was and is exercising its lawful power in its right to regulate commerce, subject to the fifth amendment. (*Monongahela N. Co.* vs. *U. S.*, 148 U. S., 336-7.)

"III. Every riparian proprietor whose lands lie on a navigable water of the United States holds these lands with notice that the Government has the right to improve the navigation in such a mode as it deems most advisable.

"IV. If, therefore, such riparian proprietor suffer damage incidental to or consequential upon such improvement, he cannot under any circumstances treat the Government as a trespasser or tort feasor; and cannot, under the fifth amendment, demand compensation, unless there is an actual physical invasion of and taking of his land for the public purpose—a physical invasion of the real estate of the private owner and a practical ouster of his possession. (*Gibson* vs. *The U. S.*, 166 U. S., 269.)

"V. The crucial question in this case is, Was there a taking of this land in the sense of the Constitution?

"The facts found show that by reason of the obstruction in the Savannah River the water has been directly backed up against the embankment on the river and the banks on and in this plantation, the superinduced addition of water actually invading it and destroying its drainage and leaving it useless for all practical purposes. The Government does not in a sense take this land for the purposes of putting its obstructions on it. But it forces back the water of the river on the land as a result necessary to its purpose, without which its purpose could not be accomplished. For the purpose of the Government, that water in the river must be

raised. The banks of this plantation materially assist this operation, for by their resistance the water is kept in the channel. The backing up of the water against the banks to create this resistance raises the water in the plantation and destroys the drainage of the plantation. This is a taking. 'It would,' says Mr. Justice Miller, 'be a very curious and unsatisfactory result if, in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the Government, and which had received the commendation of jurists, statesmen and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the Government refrains from the absolute conversion of real property to the uses of the public, it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject to total destruction without making any compensation, because in the narrowest sense of that word it has not been taken for the public use.' *Pumpelly* vs. *Green Bay Co.*, 13 Wall., 177, 178. In that case the backing up of water on land was held to be a taking.

"VI. The plantation of plaintiffs being actually invaded by superinduced additions of water directly caused by the Government dams and obstructions backing up the water of the Savannah River and raising the water level at and in the rice plantations and making it unfit for rice cultivation or for any other known agriculture, and plaintiffs having been compelled thereby to abandon the plantation, and this actual and practical ouster of possession being continued and permanent by reason of the permanent condition of the flooding of the plantation and the plantation being thereby now an irreclaimable bog of no value, makes the action of the Government a taking of lands for public purposes within the meaning of the fifth amendment, for which compensation is due to the plaintiffs. *Pumpelly* vs. *Green Bay Co.*, 13 Wall., 182; *Mugler* vs. *Kansas*, 123 U. S., 668.

"VII. The Government has not gone into actual occupancy of this land, but by reason of these dams and obstructions, made necessary by this public work, and fulfilling its purpose, the water in the Savannah River has been raised at the plaintiff's plantation and has been backed up on it and remains on it so that the drainage has been destroyed and ditches filled up, and superadded water permanently kept on the land and forced up into it, making it

wholly unfit for cultivation, and the plaintiffs have thereby been practically and actually ousted of their possession. This is taking of the land for public purposes, for which compensation must be provided. *Pempelly* vs. *Green Bay Co.*, 13 Wall., 181.

"VIII. The plaintiffs are entitled to just compensation for the taking of the 420 acres of rice land. This is estimated to be ten thousand dollars, the value of the land so taken, for which amount let the plaintiffs have judgment."

Pp. 9-10, Transcript Record.

The case of *Pumpelly* vs. *Green Bay Company*, 13 Wall., 166, cited by the Court for the doctrine that the backing up of water destroying land is a taking, is the leading case in this Court.

The rubric in that case is as follows:

3. By the general law of European nations and the common law of England, it was a qualification of the right of eminent domain that compensation should be made for private property taken or sacrificed for public use.

4. And the constitutional provisions of the United States and of the several States which declare that private property shall not be taken for public use without just compensation were intended to establish this principle beyond legislative control.

5. It is not necessary that property should be absolutely taken in the narrowest sense of that word, to bring the case within the protection of this constitutional provision. There may be such serious interruption to the common and necessary use of property as will be equivalent to a taking, within the meaning of the Constitution.

6. The backing of water so as to overflow the lands of an individual, or any other superinduced addition of water, earth, sand, or other material or artificial structure placed on land, if done under statutes authorizing it for the public benefit, is such a taking as by the constitutional provision demands compensation.

7. This proposition is sustained by the decisions of the Supreme Court of Wisconsin construing the provisions of the Constitution of that State on the subject, and by many other adjudged cases in this country.

8. The cases which hold that remote and consequential injury to private property by reason of authorized public improvements is not taking such property for public use have many of them gone to the utmost limit of that principle, and some beyond it, though the principle is a sound one in its proper application to many injuries so originating.

9. Lands sold by the United States with no reservation, though bordering on a navigable stream, are as much within the protec-

tion of the constitutional principle awarding compensation as other private property.

Idem, 166.

The statement of the case, as reported, is as follows:

The Constitution of Wisconsin ordains that

"The property of no person shall be taken for public use without just compensation therefor."

"With this provision in force as fundamental law, one Pumpelly, in September, 1867, brought trespass on the case against the Green Bay and Mississippi Canal Company for overflowing 640 acres of his land, by means of a dam erected across Fox River, the northern outlet of Lake Winnebago, by which, as the declaration averred, the waters of the lake were raised so high as to forcibly and with violence overflow all his said land, from the time of the completion of the dam, in 1861, to the commencement of this suit; the water coming with such violence, the declaration averred, as to tear up his trees and grass by the roots, and wash them, with his hay by tons, away, *to choke up his drains and fill up his ditches, to saturate some of his lands with water*, and to dirty and injure other parts by bringing and leaving on them deposits of sand, and otherwise greatly injuring him. The canal company pleaded six pleas, of which the second was the most important, but of which the fourth and sixth may also be mentioned."

Idem, p. 167.

"The plea then proceeded to say that by the act of building and completing the dam, &c., and by means of the waters of Lake Winnebago, Reed and Doty, and the State, by its board of public works, did, as *they lawfully might do, seize*, and, to the extent necessary and for the purposes of a water power and of the said improvement, take possession of the *lands and premises*, trees, grass, herbage, *drains, ditches*, &c., in the declaration mentioned, *to the extent that the same were*, as therein alleged, *destroyed, damaged, overflowed, saturated, and subverted, and otherwise injured;* that the seizure and taking possession were so made and done *under claim and color of right and title duly made by virtue of the laws of Wisconsin, and that the defendant had done as lawfully it might.*"

Idem, p. 169.

"The sixth plea alleged that by the ordinance of 1787, the Act of Congress of August 7th, 1789, the Act establishing the territorial government of Wisconsin, the Act admitting the State of Wisconsin into the Union, the Constitution of the State of Wisconsin, and the laws of the United States and of the State of Wisconsin, it was declared that the navigable waters leading into the Mississippi and St. Lawrence, and the carrying-places, &c., should be common highways and forever free; that the Fox and Wisconsin Rivers and Lake Winnebago were and ever had been of the navigable waters thus referred to; that the Fox River was a navigable water leading into the St. Lawrence."

Idem, p. 170.

"And further alleged that the *dam was built and maintained under the authority of the laws of the United States* and of the State of Wisconsin, and the board of public works; that as constructed and maintained, it was and is an *essential portion of the works for the improvement of the navigability of the Fox and Wisconsin Rivers, and to the proper development as common navigable highways;* that the ordinance, the laws of Congress and of the State, granted and assigned to the defendant, the improvement and the easement, right and privilege of overflowing, &c., the lands described in the declaration, to *the extent necessary to improve the navigability of said rivers;* that under a treaty with the Winnebago Indians, in 1832, the United States patented a certain land (of which the plaintiff's was a part), to one Theresa Paquette; that she, the said Theresa, and *original grantor of the lands described in the declaration, and all the subsequent grantees thereof, including the plaintiff, purchased with full notice of, and subject to, the easement and right aforesaid.*"

Idem, pp. 170, 171.

Justice Miller, delivering the unanimous opinion of this Court, declares as follows:

"But the same plea further alleges that the Legislature of Wisconsin, after it became a State, projected a system of improving the navigation of the Fox and Wisconsin Rivers, which adopted the dam of Reid and Doty, then in process of construction, as part of that system; and that, under that Act, a board of public works was established, which made such arrangements with Reid and Doty that they continued and completed the dam; and that, by

subsequent legislation, changing the organization under which the work was carried on, the defendants finally became the owners of the dam, with such powers concerning the improvement of the navigation of the river as the Legislature could confer in that regard. But *it does not appear that any statute made provision for compensation to the plaintiff*, or those similarly injured, for damages to their lands. So that the plea, as thus considered, presents substantially the defence *that the State of Wisconsin, having, in the progress of its system of improving the navigation of the Fox River, authorized the erection of the dam as it now stands, without any provision for compensating the plaintiff for the injury which it does him, the defendant asserts the right, under legislative authority, to build and continue the dam without legal responsibility for those injuries.*" P. 176.

"*And counsel for the defendant, with becoming candor, argue that the damages of which the plaintiff complains are such as the State had a right to inflict in improving the navigation of the Fox River, without making any compensation for them.*"

"This requires a construction of the Constitution of Wisconsin; for though the Constitution of the United States provides that private property shall not be taken for public use without just compensation, it is well settled that this is a limitation on the power of the Federal Government, and not on the States. The Constitution of Wisconsin, however, has a provision almost identical in language, viz: that '*the property of no person shall be taken for public use without just compensation therefor.*' Indeed, this limitation on the exercise of the right of eminent domain is so essentially a part of American constitutional law, that it is believed that no State is now without it, and the only question that we are to consider is whether the injury to plaintiff's property, as set forth in his declaration, is within its protection."

"The declaration states that, by reason of the dam, the water of the lake was so raised as to cause it to overflow all his land, and that the overflow remained continuously from the completion of the dam, in the year 1861, to the commencement of the suit, in the year 1867, and the nature of the injuries set out in the declaration are such as show that it worked an *almost* complete *destruction of the value of the land.*"

"The argument of the defendant is that there is no *taking* of the land within the meaning of the constitutional provision, and that the damage is a *consequential* result of such use of a navi-

gable stream as the government had a right to for the improvement of its navigation."

"It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public, it can destroy its value entirely, can inflict irreparable and permanent injury to any extent; can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not *taken* for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority for invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors."

Id., p. 177-8.

"In the case of *Sinnicksen* vs. *Johnson*, the defendant had been authorized by an Act of the Legislature to shorten the navigation of Salem Creek by cutting a canal, and by building a dam across the stream. The canal was well built, but the dam caused the water to overflow the plaintiff's land, for which he brought suit. Although the State of New Jersey then had no such provision in her Constitution as the one cited from Wisconsin, the Supreme Court held the statute to be no protection to the action for damages. Dayton, J., said '*that this power to take private property reaches back of all constitutional provisions; and it seems to have been a settled principle of universal law that the right to compensation is an incident to the exercise of that power;* that the one is inseparably connected with the other; *that they may be said to exist, not as separate and distinct principles, but as parts of one and the same principle.*' For this proposition he cites numerous authorities, but the case is mainly valuable here as showing that overflowing land by backing the water on it was considered as 'taking' it within the meaning of the principle."

"In the case of *Gardner* vs. *Newburgh*, Chancellor Kent granted *an* injunction to prevent the trustees of Newburgh from diverting

the water of a certain stream flowing over plaintiff's land from its usual course, because the Act of the Legislature which authorized it had made no provision for compensating the plaintiff for the injury thus done to his land. And he did this, though there was no provision in the Constitution of New York, such as we have mentioned, and though he recognized that the water was taken for a public use. After citing several continental jurists on this right of eminent domain, he says that while they admit that private property may be taken for public uses when public necessity or utility requires, they all lay it down as a clear principle of natural equity that the individual whose property is thus sacrificed must be indemnified. And he adds that the principles and practice of the English government are equally explicit on this point. It will be seen in this case that it was the diversion of the water from the plaintiff's land, which was considered as taking private property for public use, but which, under the argument of the defendant's counsel, would, like overflowing the land, be called only a consequential injury."

"If these be correct statements of the limitations upon the exercise of the right of eminent domain, as the doctrine was understood before it had the benefit of constitutional sanction, by the construction now sought to be placed upon the Constitution it would become an instrument of oppression rather than protection to individual rights."

"But there are numerous authorities to sustain the doctrine that *a serious interruption to the common and necessary use* of property may be, in the language of Mr. Angell, in his work on water-courses, equivalent to the taking of it, and that under *the constitutional provision it is not necessary that the land should be absolutely taken.* And perhaps no State Court has given more frequent utterance to the doctrine that overflowing land by backing water on it from dams built below is within the constitutional provision, than that of Wisconsin. In numerous cases of this kind under the Mill and Mill-dam Act of that State, this question has arisen, and the right of the mill-owner to flow back the water has been repeatedly placed on the ground that it was a taking of private property for public use. It is true that the Court has often expressed its doubt whether the use under that Act was a public one, within the meaning of the Constitution, but it has never been doubted in any of those cases that it was such a *taking* as required compensation under the Constitution."

(And this Court cites in the foot notes, the following authorities: Angell on Water-courses, section 465a; *Hooker* vs. *New Haven and Northampton Co.*, 14 Connecticut, 146; *Rowe* vs. *Granite Bridge Co.*, 21 Pickering, 344; *Canal Appraisers* vs. *The People*, 17 Wendell, 604; *Lackland* vs. *North Missouri Railroad Co.*, 31 Missouri, 180; *Stevens* vs. *Proprietors of Middlesex Canal*, 12 Massachusetts, 466.)

"We are not unaware of the numerous cases in the State Courts in which the doctrine has been successfully invoked that for a consequential injury to the property of the individual arising from the prosecution of the improvements of roads, streets, rivers and other highways, for the public good, there is no redress; and we do not deny that the principle is a sound one, in its proper application, to many injuries to property so originating. *And when, in the exercise of our duties here,* we shall be called upon to construe other State Constitutions, we shall not be unmindful of the weight due to the decisions of the Courts of those States. *But we are of opinion that the decisions referred to have gone to the uttermost limit of sound judicial construction in favor of this principle*, and, in *some cases, beyond it, and that it remains true that where real estate is actually invaded by superinduced additions of water, earth, sand, or other material, or by having any artificial structure placed on it, so as to effectually destroy or impair its usefulness, it is a taking, within the meaning of the Constitution, and that this proposition is not in conflict with the weight of judicial authority in this country, and certainly not with sound principle.* Beyond this we do not go, and this case calls us to go no further."

Idem, pp. 180-181.

"The sixth plea, after setting up all the matters alleged in the second, and also that by the Ordinance of 1787, and the subsequent legislation of Congress, the navigable streams of that territory were to be forever preserved as free highways, then avers that the land of the plaintiff came to him through a reservation in an Indian treaty in favor of one Theresa Pacquett, who received a patent from the United States in 1849. It is alleged that this title came to the plaintiff *burdened with an easement* in favor *of improving the navigation of the Fox River, which authorized the injuries complained of*, and of which, therefore, he could not complain."

"We do not think it necessary to consume time in proving that when the United States sells land by treaty or otherwise, and parts with the fee by patent without reservations, *it retains no right to take that land for public use without just compensation*, nor does it confer such a right on the State within which it lies; and *that the absolute ownership and right of private property in such land is not varied by the fact that it borders on a navigable stream.*"

Id., p. 182.

In the next case decided by this Court, *Transportation Co.* vs. *Chicago*, 99 U. S., 635, this Court said:

"The extremest qualification of the doctrine is to be found, perhaps in *Pumpelley* vs. *Green Bay Company*, 13 Wall., 166, and in *Eaton* vs. *Boston, Concord & Montreal Railroad Co.*, 51 N. H., 504. In those cases, it was held that *permanent flooding* of private property may be regarded as a 'taking.' In those cases there was *physical invasion of real estate of the private owner*, and *a practical ouster of his possession*. But in the present case, there was no such invasion. No entry was made upon the plaintiff's lot. All that was done was to render for a time its use more inconvenient."

P. 642.

The case of *Pumpelley* vs. *Green Bay Company* was thus affirmed and distinguished from a case of mere inconvenience, by reason of curtailed or diminished *access*, where the owner remained in full possession and enjoyment and continued use of his premises.

In the case at bar, the Court below has, in Finding of Facts Ten and Eleven, found the facts which the Supreme Court in *Transportation Co.* vs. *Chicago*, 99 U. S., 635, declared to be the decisive elements of the doctrine declared in *Pumpelley* vs. *Green Bay Company*.

(1.) Permanent flooding.

(2.) Physical invasion of the real estate of the private owner.

(3.) Practical ouster of his possession.

See Finding of Facts, X., XI., page 8, Transcript of Record.

In addition, the Court below also found as a fact (Findings X., XI., page 8), that the plantation was "actually invaded" by "superinduced additions of water, whereby it was effectually destroyed," which this Court held was a "taking within the meaning

of the Constitution," in *Pumpelley* vs. *Green Bay Co.*, 13 Wall., 181.

So that the Court below has found as facts, the elements on which the *Pumpelley* case originally rested, and also the ultimate facts upon which this Court further rested the doctrine in exposition of the *Pumpelly* case.

Again, this Court, in the later case of *Mugler* vs. *Kansas*, 123 U. S., 667-668, reaffirm, expound and again distinguish the *Pumpelley* case, and say:

"It is supposed by the defendants that the doctrine for which they contend is sustained by *Pumpelley* vs. *Green Bay Co.*, 13 Wall., 166. But in that view we do not concur. That was an action for the recovery of damages for the overflowing of the plaintiff's land by water, resulting from the construction of a dam across a river. The defence was that the dam constituted a part of the system adopted by the State for improving the navigation of Fox and Wisconsin Rivers; and it was contended that as the damages of which the plaintiff complained were only the result of the improvement, under legislative sanction, of a navigable stream, he was not entitled to compensation from the State or its agents. The case, therefore, involved the question whether the overflowing of the plaintiff's land, to *such an extent that it became practically unfit to be used*, was a taking of property, within the meaning of the Constitution of Wisconsin, providing that 'the property of no person shall be taken for public use without just compensation therefor.' This Court said it would be a very curious and unsatisfactory result, were it held that, 'if the Government refrained from the absolute conversion of real property to the uses of the public, it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not *taken* for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the Government, and make it an authority for the invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors."

Pp. 177, 178.

"These principles have no application to the case under consid-

eration. The question in *Pumpelley* vs. *Green Bay Company* arose under the State's power of eminent domain; while the question now before us arises under what are, strictly, the police powers of the State, exerted for the protection of the health, morals and safety of the people. That case, as this Court said, in *Transportation Co.* vs. *Chicago*, 99 U. S., 635, 642, was an extreme qualification of the doctrine, universally held, that 'acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though these consequences may impair its use,' do not constitute a taking within the meaning of the constitutional provision, or entitle the owner of such property to compensation from the State or its agents, or give him any right of action. It was a case in which there was a 'permanent flooding of private property,' a 'physical invasion of the real estate of the private owner, and a practical ouster of his possession.' His property was, *in effect, required to be devoted to the use of the public*, and, consequently, he was entitled to compensation."

"As already stated, the present case must be governed by principles that do not involve the power of eminent domain in the exercise of which property may not be taken for public use without compensation."

Mugler vs. *Kansas*, 123 U. S., 667, 668.

It is to be remembered that in repeating what was said in *Transportation Co.* vs. *Chicago*, the Court adds another element of exposition in the words:

"His property was, *in effect*, required to be devoted to the use of the public, and consequently he was entitled to ~~possession~~ compensation."

In other words, although the United States do not go into actual possession of the land permanently flooded and thus taken, the owner is thus practically put out of possession and accustomed use, and thus, *in effect*, the land is required to be devoted to the use of the public.

Again, in *Gibson* vs. *United States*, 166 U. S., 269, this Court again recognizes and affirms the *Pumpelley* case in all the particulars above mentioned and distinguish it again from a case of *access* denied or impaired; and repeat again the language of *Transportation Co.* vs. *Chicago*, quoted in full above.

166 U. S., 269-276.

And again, in the latest case of *Scranton* vs. *Wheeler*, 179 U.

S., this Court, in its last utterance, cite and affirm the principle of the *Pumpelley* case, and say:

"Undoubtedly compensation must be made or secured to the owner when that which is done is to be regarded as a taking of private property for public use, within the meaning of the Fifth Amendment of the Constitution; and of course in its exercise of the power to regulate commerce, Congress may not override the provision that just compensation must be made when private property is taken for public use. What is private property within the meaning of that amendment, or what is a taking of private property for public use, is not always easy to determine. No decision of this Court has announced a rule that will embrace every case. But what has been said in some cases involving the general question will assist us in determining whether the present plaintiff has been denied the protection secured by the constitutional provision in question."

"In *Pumpelley* vs. *Green Bay Company*, 13 Wall., 166, 181, the Court construed a provision of the Constitution of Wisconsin declaring that 'the property of no person shall be taken for public use without just compensation therefor;' observing that it was a provision almost identical in language with the one relating to the same subject in the Federal Constitution. In that case, it appeared that a public improvement in a navigable water was made under local statutory authority, whereby the plaintiff's land was permanently overflowed, and its use for every purpose destroyed. Referring to some adjudged cases which went, as the Court observed, beyond sound principle, it was said that, 'it remains true that where real estate is *actually invaded by superinduced additions of water*, earth, sand or other material, or by having any artificial structure placed on it, so as to *effectually destroy* or impair its usefulness, it is a *taking* within the meaning of *the Constitution*, and that this proposition is not in conflict with the weight of judicial authority in this country, and certainly not with sound principle.'"

"That case was relied upon in *Transportation Co.* vs. *Chicago*, 99 U. S., 635, 642, as establishing the invalidity of certain municipal acts looking to the improvement of a public highway. But this Court said that 'acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking within the meaning of the

constitutional provision. They do not entitle the owner of such property to compensation from the State or its agents, or give him any right of action. This is supported by an immense weight of authority.' It was observed in the same case that the extremest qualification of the doctrine was that found in *Pumpelley's* case, and that case was referred to as holding nothing more than that 'the permanent flooding of private property may be regarded as a "taking," ' because there would be in such case a 'physical invasion of the real estate of the owner, and a practical ouster of his possession.' "

179 U. S., pp. 153-4.

It is, moreover, interesting to know that the principle decided by this Court in *Pumpelly* case, which arose on the Fox and Wisconsin Rivers, was thereafter recognized and followed by Congress in improvement of those rivers, and the Government of the United States succeeding to the rights of the Improvement Company, actually paid for the lands flowed and thus *taken* theretofore. This appears in the case of *United States* vs. *Jones, Adm., et al.*, 109 U. S., 513.

The rubric is:

"1. The power to take private property for public uses, in the exercise of the right of eminent domain, is an incident of sovereignty, belonging to every independent government, and requiring no constitutional recognition, and it exists in the Government of the United States. *Boom* vs. *Patterson*, 98 U. S., 406, cited and approved.

"2. The liability to make compensation for private property taken for public uses is a constitutional limitation of the right of eminent domain."

P. 513.

"In July, 1870, Congress passed an Act 'for the improvement of water communication between the Mississippi River and Lake Michigan by the Wisconsin and Fox Rivers;' by which, among other things, the Secretary of War was authorized to ascertain the sum which ought to be paid to the Green Bay and Mississippi Canal Company for the transfer of its property and rights of property in the line of water communication between *Wisconsin River* and the mouth of *Fox River,* including its locks, dams, canals and franchises, or so much thereof as, in his judgment, should be needed; and for that purpose to join with the company in the appointment of a board of arbitrators."

P. 514.

"Some of the dams constructed had caused the *lands* of several

parties to be *overflowed*, and in the estimate of the amount to be paid by the United States *no account was taken of the liability of the company for such damages.* The question, therefore, soon arose whether the payment of these damages devolved upon the United States; and *this question was submitted by the Committee of Commerce of the House of Representatives to the Secretary of War, and by him was referred to the Assistant Judge Advocate General.* That officer held that liability for the damages *incurred from the flowage of water* on the lands of others, caused by the works constructed, followed the property transferred, and devolved on the United States."

P. 515.

And it appears by this case, that the same was paid by the United States as compensation. This Court, in the discussion of the question, says:

"There is, in this position, an assumption that the ascertainment of the amount of compensation to be made is an essential element of the power of appropriation; but such is not the case. The power to take private property for public uses, generally termed the right of eminent domain, belongs to every independent government. It is an incident of sovereignty, and, as said in *Boom* vs. *Patterson,* 98 U. S., 106, requires no constitutional recognition. The provision found in the Fifth Amendment to the Federal Constitution, and in the Constitution of the several States, for just compensation for the property taken, is merely a limitation upon the use of the power."

109 U. S., 518.

Here again is a distinct recognition of the doctrine of the *Pumpelley* case, both by the Executive and Legislative Departments and by this Court.

The principle of the *Pumpelly* case has also been recognized in *Kaukauna Water Power Company* vs. *Green Bay and Mississippi Canal Company,* 142 U. S., 254.

The rubric is:

"A State Legislature may authorize the taking of land upon or riparian rights in a navigable stream, for the purpose of improving its navigation, and if a surplus of water is created, incident to the improvement, it may be leased to private parties under authority of the State, or retained within control of the State; but so far as land is taken for the purpose of the improvement, either for the dam itself or the embankments, or *for the overflow, or so far as water is diverted from its natural course* or from

the uses to which the riparian owner would otherwise be entitled to devote it, such owner is *entitled to compensation.*"

Kaukauna Water Power Co. vs. *Green Bay and Mississippi Canal Co.*, 142 U. S., 254-5.

This Court say:

"It is the settled law of Wisconsin, announced in repeated decisions of its Supreme Court, that the ownership of riparian proprietors extends to the centre or thread of the stream, subject, if such stream be navigable, to the right of the public to its uses as a public highway for the passage of vessels. *Jones* vs. *Pettibone*, 2 Wisconsin, 308; *Walker* vs. *Shepherdson*, 2 Wisconsin, 384; S. C., 4 Wisconsin, 486; *Norcross* vs. *Griffiths*, 65 Wisconsin, 599. In *City of Janesville* vs. *Carpenter*, 77 Wisconsin, 288, 300, it is said of the riparian owner: 'He may construct docks, landing places, piers and wharves out to navigable waters, if the river is navigable in fact; but if it is not so navigable, he may construct anything he pleases to the thread of the stream, unless it injures some other riparian proprietor, or those having the superior right to use the waters for hydraulic purposes. Subject to these restrictions, he has the right to use his land under water the same as above water. It is his private property under the protection of the Constitution, and it cannot be taken, or its value lessened or impaired, even for public use, 'without compensation,' or 'without due process of law,' and 'it cannot be taken at all for any one's *private* use.' With respect to such rights, we have held that the law of the State, as declared by its Supreme Court, is controlling as a rule of property. *Barney* vs. *Keokuk*, 94 U. S., 324; *Packer* vs. *Bird*, 137 U. S., 661; *Hardin* vs. *Jordan*, 140 U. S., 371."

Kaukauna Co. vs. *Green Bay &c. Canal*, 142 U. S., 271-2.

Again this Court say:

"The improvement of the navigation of a river is a public purpose, and the sequestration or appropriation of land or other property, therefore, for such purpose is doubtless a proper exercise of the authority of the State under its power of eminent domain."

Idem, 142 U. S., 273.

"So far, however, as land was actually taken for the purpose of this improvement, either for the dam itself or the embankments, or for the overflow, or so far as water was diverted from its natural course, or from the uses to which the riparian owner would

otherwise have been entitled to devote it, such owner is *undoubtedly entitled to compensation.*"

Idem, p. 276.

"The only authority by which private property could be *taken or overflowed* was one derived from the State or General Government; whatever appropriation was made or injury done to such lands, was done solely for the benefit of the public, *and it was right the public should pay the compensation therefor.*"

Idem, p. 278.

"The question of compensation is one separate and apart from the transfers of which this property was the subject, but one which *in honor as well as in law*, was chargeable upon the public."

Idem, p. 279.

The *Pumpelly* case has been followed, also the case of *King* vs. *United States*, 59 F. R., 9.

EMINENT DOMAIN—FLOWAGE OF LANDS—GOVERNMENT DAMS.

"The flooding of a plantation by a Government dam, so as to render it unfit for cultivation, is a taking for public use, requiring compensation, although the government actually occupies no part thereof."

P. 9.

3. "The Government has not gone into actual occupancy of this land. But by reason of this public work, occasioned by the public work fulfilling its purpose, the water in the Savannah River has been raised at plaintiff's land, has been backed on it so that the drainage has been destroyed, the water kept on the land, and forced upon it, making it finally wholly unfit for cultivation. This is a taking of the land for public purposes, for which compensation must be provided. *Pumpelley* vs. *Green Bay Co.*, 13 Wall., 181, p. 12."

From this review it is clear that this leading case of *Pumpelly* vs. *Green Bay Co.* has been affirmed, and its principle recognized in this Court, from the time of its announcement by a unanimous Court up to the present time, in every opinion upon this subject. Its doctrine is now a fixed and a fundamental principle in the law

of eminent domain and a fixed limitation of the power of the Government of the United States to regulate commerce.

To the same effect are the concurrent views of the text writers.

Lewis on Eminent Domain, thus states the doctrine:

"Sec. 67. Works Which Set Back the Water and Cause a Flooding of the Lands Above.—The right to have a stream flow as it is wont by nature, includes the right to have the water flow off from one's premises as it is accustomed to do, and this right is property. Where works are constructed below the lands of a proprietor, such as a bridge, or dam, or alteration of the channel, which cause the water to set back and overflow the land of such proprietor, there is a violation of such right, and if the works are authorized by law, there is a *taking*, for which compensation must be made." (97).

(97.) The cases which support this proposition are very numerous. The leading cases are the following, and a number of other cases therein cited from the States of New Hampshire, Massachusetts, New York, Indiana, Maine, New Jersey, Alabama, Illinois, Missouri, Vermont, Pennsylvania, Arkansas, Georgia, Mississippi, Iowa, Minnesota, Michigan, North Carolina, South Carolina, Texas, Virginia, Wisconsin, and the Circuit Court of Appeals of several Circuits, all of which cases are fully cited in foot note to sec. 67, page 90, 1st volume, second edition, of Lewis on Eminent Domain.

To the same effect, see Mills on Eminent Domain, sec. 30, page 33. Randolph on Eminent Domain, sec. 14, page 139, says:

"The rule in Pumpelly's case represents the prevailing opinion." (See cases cited.)

It is upon these express and oftrepeated decisions of this Court, and upon the overwhelming weight of authority in the States of this Union, and the now prevailing opinion of eminent text writers on the law of Eminent Domain, that the decision of the Court below rests. That the backing up of water on lands bordering on a navigable stream and permanent flooding thereof is a taking, within the meaning of the Constitution, for which just compensation must be provided.

SECOND PROPOSITION.

The second principle upon which the decision of the Court below rests, is that power to regulate commerce exercised by Congress in

the improvement of a navigable river is subject to the limitations of the Fifth Amendment to the Constitution, and when private property is taken for, and in the course of such improvements, that just compensation must be provided. This is the doctrine reaffirmed in several cases by this Court.

In the case of *U. S.* vs. *Monongahela Co.*, 148 U. S., 312, this Court say:

"But like other powers granted to Congress by the Constitution, the power to regulate commerce is subject to all the limitations imposed by such instrument, and among them is that of the Fifth Amendment. Congress has supreme control over the regulation of commerce, but if in exercising that supreme control it deems it necessary to take private property, then it must proceed subject to the limitation imposed by this Fifth Amendment, and can take only on payment of just compensation."

P. 336.

This doctrine was asserted by this Court in the unanimous opinion in this case of *Monongahela Co.*, in its constitutional fullness for the protection against governmental invasion of private rights to the extent of holding void that part of an Act of Congress which expressly provided for the taking of the State franchise of the Monongahela company in a navigable river without compensation. In other words, that whatever the attitude of the Government be in the taking, and whatever Congress by express enactment might ordain in disregard of the constitutional provision, this Court would enforce the constitutional mandate in protection of the private rights of the citizen.

And in the case of *Scranton* vs. *Wheeler*, 179 U. S., 153, this Court say: "Undoubtedly compensation must be made or secured to the owner when that which is done is to be regarded as a taking of private property for public use within the meaning of the Fifth Amendment of the Constitution, and, of course, in its exercise of the power to regulate commerce, Congress may not override the provision that just compensation must be made when private property is taken for public use."

Id., 153.

After this full statement of the legal position of the Court below on the facts found, we can better consider the Exceptions of the United States, plaintiff in error.

EXCEPTIONS OF PLAINTIFF IN ERROR.

FIRST EXCEPTION.

The Court erred in holding that the direct result of the Government works of improvement in the Savannah River is an actual and practical ouster of possession of the rice plantation in question.

This finding complained of is a *finding of fact* by the Court below which is contained in Finding XI. of the Findings of Fact, page 8, folio 18, of the Transcript of Record, which is in these words: "The direct result to plaintiffs is an actual and practical ouster of possession on this rice plantation, cultivated by themselves and family for many years." This finding of fact is made clear by another finding of fact of the Court in Finding X., as follows:

"X. By the raising of the level of the Savannah River by these dams and obstructions, the water thereof has been backed up against the embankment on the river, and has been caused to flow back upon and in this plantation above the construction, and has actually invaded said plantation, directly raising the water in said plantation about eighteen inches, which it is impossible to remove from said plantation. This flooding is the permanent condition now, and the rice plantation is thereby practically destroyed for the purpose of rice culture or any other known agriculture, and is an irreclaimable bog and has no value."

P. 8, folios 17-18.

It this appears that these lands, which in Finding IV. of the Finding of Facts, p. 7, "had been in actual and continual use for seventy years and upwards as a rice plantation used solely for this purpose," that is, as long as the memory of man could speak by actual testimony, and which in Finding VI. was, "As appears from the plats among the muniments of plaintiff's title," were reclaimed as rice lands and enclosed and in a state of culture one hundred and twenty years ago and probably longer, "were made an irreclaimable bog of no value and practically destroyed for the purpose of rice culture or any other known agriculture (Finding X. of Findings of Fact, page 8), and all this happened as Court finds, by the raising of the level of the Savannah River by these dams and obstructions (Finding X.).

Inasmuch as this is a Finding of Fact of the Court below, it is not subject to an assignment of error here, because all these find-

ings of fact have the effect of a special verdict, and are the ultimate facts, not reviewable by this Court. Under the Act of Congress, writ of error only brings up questions of law.

Moreover, the Court finds in Finding XI., that "by reason of this superinduced addition of water actually invading the said rice plantation and its destruction thereby for all the purposes of agriculture, plaintiffs have been compelled to abandon the cultivation of the rice plantation and have been forced to pursue their calling of planting rice on other plantations below the dam." It is upon these facts that the Court below declares and finds as a fact that the direct result is an actual and practical ouster of plaintiffs from the possession of their rice plantation.

The language of the Court below upon the facts found is the language of this Court in commenting upon the *Pumpelley* case. It will be remembered that the flooding of the land in the *Pumpelley* case was described in the declaration as invading the land and "choking up his drain, filling up his ditches and saturating some of his lands with water," 13 Wallace (p. 167), and this Court says, at page 177 of *Pumpelley* case, "that the nature of the injuries set out in the declaration are such that it worked *almost complete* destruction of the value of the land" (p. 177).

It was upon this state of fact that this Court held that it remains true that when the real estate is actually "invaded by superinduced additions of water so as to effectually destroy or impair its usefulness, and it is a taking within the meaning of the Constitution," 13 Wall., p. 181.

Commenting on this case of *Pumpelley* vs. *Green Bay Co.* and facts thereof, this Court declared in *Transportation Co.* vs. *Chicago*, that this was a "*practical ouster of possession*," 99 U. S., 642.

This Court repeated this language in the case of *Mugler* vs. *Kansas*, 123 U. S., 668, adding the words, "his property was, *in effect*, required to be devoted to the use of the public, consequently he was entitled to compensation."

This language is again finally repeated by this Court in the late case of *Scranton* vs. *Wheeler*, 179 U. S., 154.

It thus appears that this assignment of error fails, because the language of the Court below in this case is the exact language of this Court used on five different occasions in declaring that under the fact, of *Pumpelley* case, which the Court below has found to

be the facts in this case, there was an actual and practical ouster of possession.

Again, inasmuch as the Court below has found an actual and practical ouster of possession, and moreover has found that this invasion of the rice plantation by superinduced addition of water actually invading such plantation and permanently flooding it and destroying it, was caused "by the raising of the level of the Savannah River by these dams and obstructions, and thereby the owner was compelled to abandon the plantation (Findings X. and XI., page 8), this Court has said in similar cases it could not disregard the finding of the Court below.

In *United States* vs. *Alexander*, 148 U. S., 192, where there was a statute for compensation for *direct injury*, this Court said, "we see no reason why we should disregard the finding of the Court below, 'that by reason of the construction of said tunnel the said well of water was drained and destroyed.' And we regard such a finding as proof that the owners of the property suffered a *direct* injury."

So in this case this Court would regard the finding of fact by the Court below, that the destruction of the plantation was, in the language of Finding of Fact X., caused "by the raising of the level of the Savannah River by these dams and obstructions," *proof of direct* results, found also as facts, that is, the invasion by water and superinduced addition of water destroying the plantation and making it an irreclaimable bog of no value and driving the owners to pursue their calling in plantations below the dam.

There cannot possibly be a case of more actual and complete and practical ouster than the condition of these claimants, who having themselves, and their forefathers for genrations, plowed, and sowed and hoed and reaped these fields as dry land, and watered them for irrigation continuously within the memory of man, cannot now set foot upon them at seed time or harvest withiut sinking in a bog, cannot plow them or sow them nor reap any harvest, and to whom in the language of the Court below the land is without value.

SECOND EXCEPTION.

"The Court erred in holding as follows: 'The facts found show that by reason of the obstruction in the Savannah River the water has been directly backed up against the embankment on the river and the banks on and in this plantation, the superinduced addition

of water actually invading it and destroying its drainage and leaving it useless for all practical purposes. The Government does not in a sense take this land for the purpose of putting its obstructions on it. But it forces back the water of the river on the land as a result necessary to its purpose, without which its purpose could not be accomplished. For the purpose of the Government that water in the river must be raised. The banks of this plantation materially assist this operation, for by their resistance the water is kept in the channel. The backing up of the water against the banks to create this resistance raises the water in the plantation and destroys the drainage of the plantation. This is a taking.'"

Page 12.

This is the fifth finding of law by the Court.

The facts here recited and summarized are a part of the facts found in Findings Ten and Eleven of the Findings of Fact.

These shew:

(1.) That by reason of the obstructions in the Savannah River the water has been directly backed up against the embankment on the river and the banks *on and in this plantation.*

(2.) The superinduced addition of water actually invading it.

(3.) The destruction of its drainage and of the plantation for all practical purposes.

(4.) The Government "forces back the water of the river *on the land* as a result necessary to its purpose."

The other Findings of Fact Ten and Eleven not referred to in this Conclusion of Law, but more fully stated in Conclusion Six of Law (p. 10), are:

(1.) Permanent condition of flooding of the plantation.

(2.) Plaintiffs having been compelled thereby to abandon the plantation and this actual and practical ouster of possession being permanent.

And are to be read in connection with this partial statement of fact in Conclusion of Law Five.

These elements being the facts found, the Conclusions of Law Five and Six, that they constitute a "taking" within the meaning of the Constitution requiring just compensation, fully appears on the review above of the *Pumpelley* case, and its exposition by this Court in the several cases above cited confirming, enforcing and illustrating its doctrine.

In these conclusions of law, the Court below was but following strictly the path of this Court.

THIRD EXCEPTION.

The Court erred in holding that the erection and maintenance of Government works in the bed of a navigable tidal river, for the improvement of the navigation thereof, whereby the water in said river is backed up against the banks of a rice plantation lying on said river, and destroying the drainage thereof, amounts to a taking of the said plantation for public use.

It will be noted in this Exception that in this error alleged to the law as found by the Court the specification has not set out the part referred in *totidem verbis*, as required by Rule 21, nor does it quote from any finding of law or of fact by the Court.

It is to be noted again that in framing this exception that the plaintiff in error have not stated fully all the facts which the Court finds, but have omitted the principal fact and have stated only the secondary fact. The principal fact found by the Court is the flooding, as follows: "By the raising of the level of the Savannah River by these dams and obstructions the water has been backed up against the embankment on the river and has been caused to flow back *upon* and *in* this plantation above the obstruction, and *has actually invaded said plantation, directly raising the water* in said plantation about 18 inches, which it is impossible to remove from said plantation. This flooding is the permanent condition now."

P. 8, fol. 17.

This is the main fact found by the Court. This permanent flooding of course destroys the drainage. To emphasize this the Court find, as an independent fact in finding IX., "The direct effect thereof is to raise the level of the Savannah River at this plantation and to keep the point of mean low-water above its natural point, so that the outlet of the trunk and water ways above spoken in the bank of said plantation instead of being above this point at low-water mark is now below this point." In other words, the river at low water (that is, "the main, the permanent river," as it is called by Chief Justice Marshall in *Handy* vs. *Anthony*, 5 Wehaton, page 374, being the natural flow of the river to the sea, without the influence of the tide, backing it up,) has by these dams itself been backed up above all of the ditches and drains and

water ways of the plantation, so that the total permanent effect on this tidal fresh water river by the Government works both at the high and low water is to back up, flood and imprison its waters on, upon and in this plantation to its complete destruction for agriculture and the driving away of the tillers of the soil for over a century. This is not a mere case of prevention of water flowing out—that is mere surface drainage destroyed, as this exception would seem to imply.

It is a case of destruction by river water flowing back upon and in the plantation, and actual invasion and flooding by the river directly! We cannot escape the facts.

"Finding of fact X. By the raising of the level of the Savannah River by these dams and obstructions the *water thereof* has been backed up against the embankment on the river and has been caused to *flow back upon* and *in this plantation* above the obstruction and has *actually invaded said plantation* directly raising the water in said plantation about 18 inches, which it is impossible to remove from said plantation. This *flooding* is the permanent condition now and the rice plantation is thereby practically destroyed for the purpose of rice culture or any other known agriculture, and is an irreclaimable bog and has no value."

P. 8.

Finding of fact XI.

"By reason of this superinduced addition of water actually invading the said rice plantation and its destruction thereby for all purposes of agriculture, plaintiffs have been compelled to abandon the cultivation of said rice plantation and have been forced to pursue their calling of planting rice on other plantations below the dam. The direct result to plaintiffs is an actual and practical ouster of possession of this rice plantation cultivated by themselves and family for many years."

P. 8.

On these findings this is not simply the destruction of the surface drainage found by the Court, but it is also a flooding of the land by the backing up of the river, which of course necessarily involves the destruction of drainage.

In the leading case of *Pumpelley* vs. *Green Bay Co.*, 13 Wall., 167, as we have seen, the allegation and fact in that case was, as it must be in every case of destruction by backing up of water, that "result was to choke up his *drains*, fill up his *ditches* and

saturate some of his lands with water." This is one result of backing up of the river, just as in this case it is alleged in our complaint that the backing of the Savannah River, among other things, filled the ditches and saturated the land with water. Page 3, folio 5. But as alleged, and as the Court below found, it did more; it permanently flooded and destroyed the plantation by a superinduced addition of water actually invading the plantation.

Upon the facts as found in full by the Court without omission of vital facts, we rest this case on the authority of the *Pumpelley* case as expounded by this Court, in the light of which this exception is of no avail.

FOURTH EXCEPTION.

The Court erred in holding that a riparian owner of rice lands dependent for their irrigation and drainage upon the natural flow of the waters of a tidal river is entitled to compensation by the Government, under the fifth amendment to the Constitution, for damages arising from the construction and maintenance of Government works for the improvement of navigation of said river, erected and maintained wholly within the bed of said river, by which the mean low-water level of said river is raised and the natural drainage of the said lands destroyed.

Here again there is a violation of the rule of this Court, 21, that the assignment should contain the specification in *totidem verbis* of the particular matter of law excepted to. Failing to do this this assignment of errer omits the facts which the Court found and upon which it rests its judgment. By this assignment of error it would appear that the only result of the facts found was that by the Government works only the mean low-water level "of the said river is raised and the *natural* drainage of said lands destroyed," whereas, as matter of fact, the Court found not only that the low-water level of the Savannah River was raised, that is, that the "main, the permanent river" (without the effect of the tide) was backed up and the permanent effect was to destroy the drainage, but the Court also found as direct result of the Government dams and obstructions, (1) That the waters of the Savannah River are backed up against the embankment on the river and flowed back *upon* and *in* this plantation and has actually invaded said plantation. That this actual invasion of the river directly raises the water in the plantation eighteen inches,

which it is impossible to remove from said plantation. That this flooding is permanent and that the plantation is destroyed for the purpose of agriculture and is an irreclaimable bog of no value." (Finding X., p. 8.)

In other words, that this is not simply the backing of the water preventing the natural drainage from the plantation outward, but it is the backing of the water of the Savannah River, actually invading the plantation, flowing back on, upon and in the plantation to its destruction, and that this is a permanent flooding.

And the Court further finds that this superinduced addition of water actually invading the plantation from the river and destroying this plantation has compelled plaintiffs to abandon the plantation and the direct result is an actual and practical ouster of possession. (Finding XI., page 8.)

The judgment of the Court rests not on a partial statement of its findings, but on the entire statement, and it is proper in assigning error to state the whole facts, which this assignment of error does not do, either in words of the Court or in the words of counsel. When all the facts are stated upon which the conclusions of law rests, its correctness becomes manifest in the light of *Pumpelley* case and the decisions of this Court expounding and differentiating same.

FIFTH EXCEPTION.

The Court erred in holding that the property of the plaintiffs has been taken by the Government for public use.

SIXTH EXCEPTION.

The Court erred in holding as follows: "The plaintiffs are entitled to a just compensation for the taking of the 420 acres of rice land."

SEVENTH EXCEPTION.

That the Court erred in holding that the plaintiffs are entitled to recover upon the facts found by the Court in this action.

EXCEPTIONS V., VI. AND VII.

We submit that these exceptions cannot avail upon the statement of the case heretofore in this Brief and decisions of this Court as heretofore set forth in full above.

EIGHTH EXCEPTION.

The Court erred in failing to hold that the intention of the Government in the erection and maintenance of the works of improvement in question was only to improve its own property, and not to acquire the property of another.

The error here alleged is that the Court failed to hold an alleged *intention* of the Government.

A.

By inspection of the pleadings no issue of fact is made as to what the intention of the Government was.

B.

The Court has made no finding of fact as to what the intention of the Government was, and so far as it is a matter of fact no error can be assigned to the failure of the Court to make a finding which neither appears in issue in the pleadings, and upon which the record does not disclose any request of the Court to make any finding, nor does it appear that there was any evidence before the Court upon which the Court could find, as matter of fact, what the intention of the Government was, and it therefore cannot be assigned as error in the Court below not making any finding upon the same.

C.

Again as matter of law, from the facts that were actually found, there is no presumption that the Government of the United States did not intend to take, or require, the property of these plaintiffs. On the contrary the necessary intention of the Government was to take these lands because it was "rendered necessary by the execution of the Government plans," as specifically found by the Court below in Finding of Fact XII., page 8. The actual invasion of these lands by the superinduced addition of water by the backing of Savannah River by these dams rendered necessary by the Government's plans, surely implies on the part of the Government under the limitations of the Fifth Amendment and the operation of the *Pumpelley* case as a principle of law, an intention to take the lands.

D.

Even if the Government did not actually intend to take these

lands within the constitutional meaning, or the mind of the Government was absolutely vacant upon the question whether they intended to take them or not, still, inasmuch as it has been found, as matter of fact, that their permanent flooding and practical ouster of plaintiff's possession which has been done by the Government as necessary in the execution of its plans, is a taking within the meaning of the Constitution under principles and cases decided by this Court, the intention of the Government would not effect the right of the citizen to protection under the Constitution of the United States.

In the *Pumpelley* case, 13 Wallace, page 166, the statute of improvement did not make any provision for compensation to the plaintiff, and the clear intention was that the Government did not intend to take the land so far as its intention could be gathered, either from its legislative or from its executive action. Notwithstanding that, however, and because of the *actual facts* of the case and the taking of the land within the meaning of the Fifth Amendment of the Constitution rendered necessary for the execution of the Government plans, the Court held the citizen entitled to compensation for the land actually taken by the backing up of the waters.

In the later case of the *Monongahela Co.* vs. *U. S.*, 148 U. S., 312, even as against the express intention of the Act of Congress in forbidding compensation for the property of the citizen actually taken or destroyed by the Government, in the exercise of the right to regulate commerce in the improvement of a navigable river, this Court held the Constitutional mandate higher than the legislative or executive intention. The facts in that case are as follows:

The Act of Congress providing for condemnation of the company's locks and dams in the Monongahela River:

"*Provided*, That in estimating the sum to be paid by the United States, the franchise of said corporation to collect tolls shall *not* be considered or estimated."

148 U. S., p. 313.

This Court said:

"The principal question at bar is whether the proviso in the River and Harbor Act of August 11, 1888, is valid."

Idem, 320.

The attitude of the Government, as stated by this Court, was:

"On behalf of the Government, on the contrary, it was claimed by the district attorney, and held by the Court below, that the right of the United States to regulate and absolutely control the navigation of the Monongahela River was supreme and paramount; that it was not within the power of the State to grant to any corporation or persons a *franchise in*, or connected with, the navigation of said river which was not wholly subordinate to the *rights of the United States;* that any franchises granted by the State had, as matter of law, necessarily within it, as a condition, that it *might be terminated at any time by an act of the United States*, and that, therefore, no injury *entitled to compensation* could accrue to any party claiming such franchise, by reason of the exercise of such paramount right by the United States."

P. 320, *Idem.*

In concluding its opinion against this contention of the Government this Court say:

"These are all the questions presented in this case. Our conclusions are, that the Navigation Company rightfully placed this lock and dam in the Monongahela River; that, with the ownership of the tangible property, legally held in that place, it has a franchise to receive tolls for its use; that such franchise was as much a vested *right* of property as the ownership of the tangible property; that the right of the National Government under its grants of power to *regulate commerce*, to condemn and appropriate this lock and dam belonging to the Navigation Company, is subject to the *limitations imposed* by the Fifth Amendment, that private property shall not be taken for public uses without just compensation; that just compensation requires payment for the franchise to *take tolls*, as well as for the value of the tangible property; *and that the assertion by Congress of its purpose to take the property does not destroy the State franchise.*"

P. 344-5, *Idem.*

And this Court enforced payment as compensation for property of which the Monongahela River was deprived, *i. e.*, its franchise against the *intention* of an Act of Congress.

It thus appears that whether there was any actual *intention* on the part of the Government, either the legislative or executive department is immaterial, this question is determined as matter of law upon the legal effect of the ultimate facts found, and not by any arbitrary standard of intention or non-intention on the part of the Government, its agents or officers.

NINTH EXCEPTION.

The Court erred in failing to hold that plaintiff's title to the rice land, lying between high and low water on a tidal river, was subservient to the right of the Government to cause the waters of said river to be held back thereon for the benefit of navigation without compensating the owners for damages resulting therefrom.

It cannot be assigned as error of law that the Court failed to hold that the title of the plaintiff was subservient to such alleged rights of the Government, inasmuch as no such issue was raised in the pleadings and it does not appear that the Court below was asked to pass upon this question. Indeed it appears in this record in the assignment of error for the first time in this case. The pleadings are as follows:

The plaintiffs allege the title to this plantation in paragraph third of the complaint.

P. 2, Record.

The United States defendant in its answer alleges no knowledge or information sufficient to form a belief as to the allegation of paragraph third of the petition and complaint. (P. 5, fol. 10.) This is a denial of title and in effect it is the defense of the general issue.

The defense that this title of the plaintiffs' which is found to be absolute by the Court is *subservient* to the rights of the defendant is nowhere set up in the answer, and was not an issue in the case. The defense of a *servitude* is an affirmative defense and must be specially pleaded. But in this case we have no affirmative defense of such servitude, no allegation and no issue, and not presented to the Court below, but presented here for the first time to this Court on a question not even made in the record. This Court has often declared it will not consider such a question.

II.

This assignment of error wrongly assumes that the finding of fact on the part of the Court was that the whole of the rice lands were between mean high and low water on a tidal river. On the contrary, in the words of the finding of the Court, "that portion of the plantation fronting on the river and dedicated to the culture of rice extended almost up to if not quite to low water mark and a large *part of it* was between mean high water mark and low

water mark, protected from the river by an embankment." See amendment to the fifth Finding of Fact, page 16, fol. 32.

By examination of the plat, page 12, of record, it is under the finding that *a part* only of lot "No. 1, containing 443 acres," reclaimed and enclosed within the red lines, has a level between mean high water and low water. This finding of fact does not apply to the rice plantation as a *whole*, but only applies to certain part of it, which depression and inequalities exist behind the banks of all fresh water streams. By the finding of the Court, the rice plantation as such was before the dams above the mean high water level of this tidal river and, as is well known in rice planting, was flooded as a whole for irrigation on the *spring tides*.

Moreover it is found by the Court as a fact that the whole plantation was "protected from the river by an embankment" and by this embankment the lands have been "enclosed and in a state of culture for a hundred and twenty years and probably longer, as appears by the plaintiffs' muniments of title, in addition to the fact found of actual continual use as a rice plantation for seventy years and upwards, which is as far as the memory of man can go."

Findings of Fact IV., V. and VI., page 7.

And this possession was an "actual exclusive *pedis possessio*."

P. 15, fol. 30.

The fact that within the river embankment in the rice plantation there are depressions between the mean high water level and the mean low water level of this tidal river has not affected the culture of this rice plantation in all its history since its reclamation; it is only by the backing up of the water of the Savannah River, by reason of these dams, upon and in this rice plantation and permanent flooding, has this rice plantation been destroyed. The Court finds that the value previous to the backing up of the water was ten thousand dollars; since the backing up of the water the value is nothing. The Court finds that for 120 years this property has been reclaimed, enclosed and in a state of culture, and probably longer. The Court finds to-day it is permanently flooded and an irreclaimable bog. That part between the level of mean high water and mean low water is equally effected and destroyed as a part of a rice plantation as that above the ordinary high water.

The title to this rice plantation including the depression between mean high water and mean low water is found to be absolute by the Court. It has been confirmed three times by the Legislature of South Carolina: S. C. Revised Stat. of 1873, 1882, and 1893.

It is found by the Court that the whole rice culture of South Carolina is founded upon this system and the policy of the colony and the State has been to grant such lands for rice culture; that it is necessary to have the lands dry to prepare the same for planting and to plant the rice crop, which is afterwards flowed while the rice is growing and again dry while the rice is being harvested. That the State has for one hundred and fifty years protected such rice lands from destruction by backing up water on them. (Finding V., page 7.)

Such being the facts the general law is plain that even if this whole rice plantation were between ordinary high water and low water on a tidal river granted by the State for such purposes and protected from the river by an embankment, and actually enclosed, reclaimed and devoted to agriculture for over a century, once the shore, not the bed of the river, it has become private property absolute, and any public right of navigation and of fishery therein has ceased and any trust for the public in the State, or thereafter in the United States, has ceased; such public right, being defeasible by actual occupation, reclamation, enclosure, possession and tillage for over one hundred and twenty years, and that such lands between mean high and low water have become private property in the absolute sense, subservient to no easement and which cannot be taken, by backing up the water on them and destroying them, without compensation.

And in addition that in the State of South Carolina the public trust for navigation is only of the beds of rivers below the *low water;* but that the shore of a tidal river is grantable to the individual absolutely.

LAW OF SOUTH CAROLINA.

The local law of South Carolina on the title of lands between ordinary high and low water has been clearly set forth by the Circuit Judge (who delivered the opinion in this case) in the case of *Chisolm* vs. *Caines*, 67 F. R., p. 290-291, which we reproduce here as a convenient summary and refer to:

"The right of the sovereign over marsh tide lands is determined by the local law. In an elaborate opinion, the Supreme Court, in *Shively* vs. *Bowlby*, 152 U. S., 1, 14 Sup. Ct., 548, reviews the law of all the States, and concludes the review thus:

"The foregoing summary of the laws of the original States, shows that there is no universal rule on the subject, but that each State has dealt with the lands under the *tide waters* within its borders according to its own views of justice and policy; reserving its own control over such lands or granting rights therein to individuals or corporations, whether owners of the adjoining upland or not, as it is considered for the *best interests of the public.*"

In *Lowndes* vs. *Board*, 153 U. S., 1, 14 Sup. Ct., 758, the Court says:

"The questions in this case are mainly of a local character, in respect to which the settled rules of decision in the Courts of the State are controlling. They relate to the form of action, the title of the plaintiff to submerged lands in Huntingdon Bay, and the special defense of the defendant."

See, also, *Hardin* vs. *Jordan*, 140 U. S., 371, 11 Sup. Ct., 808, 838.

"The uniform rule in South Carolina has been to treat marsh lands as subject to grant, to grant them, and to tax them when granted. 4 St. at Large, 627; 5 St. at Large, p. 39, secs. 4 and 6; 6 St. at Large, 7; 7 vol. Stat., 151; *State* vs. *Pacific Guano Co.*, 22 S. C., 50; *State* vs. *Pinckney, Id.*, 488; *Frampton* vs. *Wheat*, 27 S. C., 293; 3 S. E., 462; *Oak Point Mines*, 22 S. C., 593; *Chamberlain* vs. *Railroad Co.* (S. C.), 19 S. E., 743. The grant in question covers the marshes, and has been recognized by the colonial assembly of the province of South Carolina. Nor is this in conflict with the general law. In Hale's Treatise, De Jure Maris, 'a great authority' (*Shively* vs. *Bowlby*, 152 U. S., at page 11, 14 Sup. Ct., 548), chapter 6, under the head 'Concerning the Ownership in Property which a Subject may Have in the Seashore and Maritime Increments, &c.,' he says, 'The seashore and the maritime increases belong, *prima facie*, to the king; yet they may belong to the subject, in point of propriety, not only by charter or grants thereof there can be but little doubt, but also by prescription or usage.' Discussing the shore of the sea, he says that there are three sorts of shores, according to the various tides: (1) The high spring tides at the equinoctial. The lands they overflow do not, *de jure Communi*, belong to the crown; 'for such spring tides many times overflow ancient meadows and salt marshes, which

yet unquestionably belong to the subject, and this is admitted of all hands.' (2) The spring tides, happening monthly. 'The lands overflowed by these fluxes ordinarily belong to the subject, *prima facie*, unless the king hath a prescription to the contrary.' (3) 'Ordinary or neap tides, which happen between the full and change of the moon, and this is what is properly *littus maris*. * * *' Touching this kind of shore, viz: that which is covered by the ordinary flux of the sea, is the business of our present inquiry: (1) *This may belong to a subject;* (2) *it may not only belong to a subject in gross*, but it may be *parcel of a manor;* (3) It may *not only be a parcel of a manor*, but, *de facto, it many times is so*. See note to *Mather* vs. *Chapman*, 16 Am. Rep., 60."

"The law in New Jersey is like that in South Carolina:

"All navigable waters within the territorial limits of the State, and soil under such waters, belong in actual propriety to the public. The riparian owner, by the common law, has no peculiar rights to this public domain, as incidents of his estate. The privileges he possesses by local custom or by force of the wharf act, to acquire such rights, can, *before possession has been taken*, be regulated or revoked at the will of the Legislature. The result is that there is no legal obstacle to a grant by the Legislature to the defendants of that part of the property of the public which lies in front of the lands of the plaintiff, and which is below high water mark." *Stevens* vs. *Railroad Co.*, 34 N. J. Law, 532.

"In the *City of Hoboken* vs. *Pennsylvania R. Co.*, 124 U. S., 656, 8 Sup. Ct., 643, the question was as to the validity of a grant of marsh land in fee for exclusive use of the defendant. After a most elaborate and learned argument, the Court gave its opinion, concluding:

"Under this grant the land conveyed is held by the parties on the same terms on which all other lands are held by private persons under *absolute* titles, and every previous right of the State of New Jersey therein, whether proprietary or sovereign, is transferred and extinguished, except such sovereign rights as the State may lawfully exercise over *all other* private property."

"It would seem that there is a great distinction between the shores of the great ocean, the beds of harbors, the *channels* of rivers and highways of commerce, and these *mud shoals* cast up

by the currents on the sides of harbors and streams. The former must always be kept open for public use, commerce, trade and pleasure. The latter can be separated from any public use, and can be vested in individuals or corporations, at the will of the sovereign power. *They are not aids to, but obstructions to, navigation,* and can be utilized for the public good in any way the sovereign may decide. And, when it can be done without detriment to the lands and waters remaining, they can always be disposed of, and *vested absolutely* in private persons. *Illinois Cent. R. Co.* vs. *Illinois,* 146 U. S., at pages 456, 457, 13 Sup. Ct., 110."

Chisolm vs. *Caines,* 67 F. R., 290, 291.

In the case of the *State* vs. *Pacific Guano Co.,* 22 S. C., 83-4, the Court say, speaking of the public trust in navigable waters, that the "beds of such channels *below low water* mark" are not held by the State as vacant lands, but in trust for the public; and at page 85, the Supreme Court quote with approval the language of the *Oak Point Mines* case, "As to the title to the bed of the creek *below ordinary low water,* I hold that it is in the State."

The Statute of Limitations of the State of South Carolina is a Civil Code S. C., Rev. Stat. S. C., 1893, vol. 2, secs. 95 and 103:

Section 95. The State will not sue any person for or in respect to any real property, or the issues or profits thereof, by reason of the right or title of the State to the same, unless

1. Such right or title shall have accrued within twenty years before any action or other proceeding for the same shall be commenced; or unless

2. The State, or those from whom it claims, shall have received the rents and profits of such real property or of some part thereof, within the space of twenty years.

Sec. 103. For the purpose of constituting an adverse possession, by any person claiming a title founded upon a written instrument or a judgment or decree, land shall be deemed to have possessed and occupied in the following cases:

1. Where it has been usually cultivated or improved.
2. Where it has been protected by a substantial enclosure.

We have quoted above the statutes confirming this colonial grant and the statute protecting rice land under the severest penalty from destruction by backing water as policy of the colony and State.

GENERAL LAW.

In *Commonwealth* vs. *Alger*, 7 Cush., 68, the Court states the doctrine that the private title to the shore or flats by Massachusetts statute allows "the public right to pass on foot over flats or places over which the sea ebbs and flows, *so long as they are not actually reclaimed and converted into tillage or mowing land.*"

P. 68, *Idem.*

Upon this last point, we may as well remark here, that the right of the riparian proprietor, under the ordinance, has always been held subject to this rule: that until he *shall build upon his flats or inclose them*, and whilst they are covered with the sea, all other persons have the right to use them for the ordinary purposes of navigation. This probably results from the general and acknowledged rights of the public to navigate the sea and all its arms and branches, and so long as the owner of the flats permits the sea to flow over them, the individual right of property in the *soil beneth does not restrain or abridge the public right to the appropriate use of them.*"

P. 75, *Idem.*

"The views, we believe, that the Courts of this State have constantly taken of the construction of the colony ordinance, are these: That it vested the property of the flats in the owner of the upland in fee, in the nature of a grant; but that it was held *subject to a general right of the public for navigation until built upon or inclosed.*"

P. 79, *Idem.*

See *Shiveley* vs. *Bowley*, 152 U. S., p. 19, as to Massachusetts law, and the same as to the law of New Jersey, Oregon, Maryland. Pp. 22, 54-56, *Idem.*

This Court has fully stated the rule in the *City of Boston, Plaintiff in Error*, vs. *David R. Lecraw*, 17 Howard, 426:

"By the old laws of Massachusetts, a littoral proprietor of land owned down to low water mark; subject, however, to the condition, that, *until he occupied the space between high and low water mark*, the public had a right to use it for the *purposes of navigation.*"

P. 426.

"This is the foundation of what may be called the common law

of Massachusetts on this subject. By it the grantee of land bounding on navigable waters where the tide ebbs and flows, acquires a legal right and a vested interest in the soil of the shore between high and *low water mark* and not a mere indulgence or gratuitous license, given without consideration and revocable at the pleasure of the grantor. See *Austin* vs. *Carter*, 1 Mass. Rep., 231, and *Commonwealth* vs. *Alger*, 7 Cush., 71.

"But the right of littoral proprietor under the ordinance has always been subject to this rule: that until he should build *upon his flats or inclose them*, and whilst they are covered with the sea, all other persons have the right to use them for the ordinary purposes of navigation."

Pp. 432-3, *Idem.*

"The exercise of the public right of navigation over the soil of defendant is fully accounted for without any presumption of grant or dedication by the owners. The public enjoyed this highway of nature by a title reaching far before the advent of the Pilgrims, and paramount to any grant to them or by them; but by the law the enjoyment of this public right was made *defeasible* by the owner of the land. *Till he reclaimed his land*, the public needed no grant or declaration by him, in order to their enjoyment of the right of navigation over it."

"The Court ought, therefore, to have instructed the jury that the public right of navigation over the land of defendant was *defeasible*."

P. 436, *Idem.*

Again in *Richardson* vs. *the City of Boston*, 19 Howard, 269, this Court say:

"But the plaintiff in that case claimed no other right of way over the lands of defendant, save the public right of navigation; and this Court decided that the *public right of navigation, between high and low water mark*, was *defeasible* at any *time by the owner of the subjacent* land. That as the space between the plaintiff's wharves had been converted into a dock by the accident of its position, *so long as it remained unreclaimed*, every person had a right to pass and repass over it. The exercise of this public right, for any length of time whatever, would therefore form no

grounds of presumption either of a public dedication or a private grant to the owners of the adjoining wharves. While it remains *unreclaimed,* it is a public highway or dock, by a *paramount but defeasible title.*"

Idem, p. 269.

"But in the present case the City of Boston is owner of the land, and has the *same right to reclaim their flats which other owners have. Before they are so reclaimed* the public and the adjoiners may exercise their *paramount right of navigation.*"

That the public trust for navigation does not attach to these reclaimed lands on the shore, is again recognized by this Court in *Illinois Central Railroad* vs. *Illinois,* 146 U. S., 387:

"It is grants of parcels of lands under navigable waters, that may afford foundation for wharves, piers, docks and other structures in aid of commerce, and *grants of parcels which, being occupied, do not substantially impair the public interest in the lands and waters remaining, that are chiefly considered and sustained in the adjudged cases as a valid exercise of legislative power consistently with the trust to the public upon which such lands are held* by the State. But that is a very different doctrine from the one which would sanction the abdication of the general control of the State over lands under navigable waters of an *entire harbor* or *bay, or of a sea or lake.* Such abdication is not consistent with the exercise of that trust which requires the government of the State to preserve such waters for the use of the public. The trust devolving upon the State for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property. The control of the State for the purposes of the trust can never be lost, *except as to such parcels as are used in promoting the interests of the public* therein, or *can be disposed of without any substantial impairment of the public interest in the lands and waters remaining.*"

P. 452-3, *Idem.*

"The State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties, except in the instance of parcels mentioned for the improvement of the navigation and use of the waters, or *when*

parcels can be disposed of without impairment of the public interest in what remains, than it can abdicate its police powers in the administration of government and the preservation of the peace."

P. 453, *Idem.*

"*It is also true that portions of the submerged shores and flats, which really interfered with navigation, and could better subserve the purposes of commerce by being filled up and reclaimed, were disposed of to individuals for that purpose. But neither did these dispositions of useless parts affect the character of the title to the remainder.*"

P. 457, *Idem.*

By this doctrine the reclaimed and enclosed flat and shore forming part of this rice plantation, does not partake of the character of the title to the bed of the river, the channel of navigation, and no public trust attaches to it after reclamation.

This Court has again recognized the absolute private ownership, *excluding every public right* in such land:

"Having in view the manifest policy of this legislation and the force and meaning of its language, we do not hesitate to adopt the conclusion that the several grants of the State to the united companies, under the Act of March 31, 1869, to enable them to *improve their lands* under water at Kill von Kull and other places, and the grants under the general Act of the same date, under which the other defendant claim, were intended to secure to the grantees the *whole beneficial interest and estate in the property described,* for their exclusive use for the purposes expressed and intended in the grants. And, construing these conveyances most strongly in favor of the public, and yet so as not to defeat the grants themselves, we also conclude that the rights *conveyed exclude every right of use or occupancy on the part of the public in the land itself.* The land granted is specifically described by metes and bounds. The grant is a grant of the estate in the land, and not of a mere franchise or incorporeal hereditament. The uses declared are such as require an exclusive possession by the grantees, that they may hold, possess, improve and use the same for their own use and profit, according to the nature of the business which by law they are authorized to conduct. In other words, under these grants the land conveyed is held by the grantees on the same terms on which all other lands are *held by private persons under absolute* titles, and *every previous right of the State of New Jersey therein,* whether proprietary or sovereign, is transferred or extinguished,

except such sovereign rights as the State may lawfully exercise over *all other private property.*"

Hoboken vs. *Penn. R. R. Co.*, 124 U. S., 691.

This doctrine is again illustrated in the case of *Hanford et al.* vs. *St. Paul & D. R. Co.*, 44 N. W. Rep., 1144, dealing with

"The right of a riparian proprietor upon navigable waters to improve, *reclaim and occupy the submerged lands out to the point of navigability*," although originally incident to the riparian estate, may be separated therefrom, and be transferred to and enjoyed by persons having no interest in the original riparian estate. Overruling *Land Co.* vs. *Emerson*, 38 Minn., 406, 38 N. W. Rep., 300.

P. 1144.

The Court say:

"A considerable extent of the *shores*, not only along tide waters of the ocean coasts, but on our great inland waters, are of such a nature, out to and even beyond low water mark, as to be in general unavailable by the public for the purposes of navigation, and *must remain forever waste and useless lands, unless reclaimed by artificial means from the shallow water covering them, or unless otherwise improved.* It is established beyond question in this State, and in other States as well, that the proprietor of the riparian lands may make *such improvements.*"

"It is for the interest of the State that such lands, not available for the public purposes for which alone the State exercises authority over them, *shall be improved and used for profitable enterprises, rather than that they lie forever waste and unproductive.* And the State, while recognizing the ancient riparian right of occupancy, has not assumed to prescribe or to limit the purposes or manner of its enjoyment. That seems to have always been left to the discretion of the person in whom the right is exclusive, and the decided cases afford many illustrations of uses in no way connected with the purposes of navigation."

Pp. 1145-6, *Idem.*

"This right of the riparian proprietor, even before it has been in any manner exercised by reclaiming or improving the premises—the right itself to reclaim, improve or occupy—is a property right vested in him, recognized and protected in the law as property. He cannot be deprived of it without due process of law. It can-

not be taken from him, and devoted to public use, *without compensation*. *Brisbane* vs. *Railroad Co.*, 23 Minn., 114; *Carli* vs. *Railway Co.*, 28 Minn., 373, 10 N. W. Rep., 205; *Depot Etc. Co.* vs. *Brunswick*, 31 Minn., 297, 17 N. W. Rep., 626; *Yates* vs. *Milwaukee*, 10 Wall., 497; *Bell* vs. *Gough*, 23 N. J. Law, 624; *Delaplaine* vs. *Railway Co.*, 42 Wis., 214; *Lyon* vs. *Fishmonger's Co.*, L. R. 1 App., 662. Such property is subject to the law of eminent domain."

P. 1146, *Idem.*

"These peculiar property rights of the riparian owner may constitute, estimated in connection with the riparian land, the chief value of the premises. It may even be that the whole value of such real property consists in the right to *improve and occupy* the submerged lands for private purposes."

P. 1145, *Idem.*

This principle is also further expounded in *Miller* vs. *Mendenhall*, 44 N. W., 1141 (Minn.):

"In this country the generally accepted doctrine is that the *jus privatum* passes to the owner of the adjacent lands, and in this State extends to *low water mark*, with the accompanying riparian rights, while the *jus publicum* belongs to the State, which holds the title to the soil under the water as trustee. 'The sovereign is trustee for the public, and the use of navigable waters is inalienable.'"

3 Kent Comm., 427. See *Com.* vs. *Alger*, 7 Cush., 89, 93.

"The State is authorized to regulate the exercise of riparian rights in the interests of the public, and may also make concessions to private owners of possessory rights in the soil of navigable waters, the effect of which will be to give them private and exclusive rights equivalent to a grant. Gould, Waters, secs. 138-140. *While the public right of navigation and fishery may not be extinguished until the waters are excluded, yet after the submerged land is filled or occupied, the riparian owner will have the exclusive right of possession, and the entire beneficial interest.*"

The leading case of the recognition by the United States of the *vested right*, by use and occupancy of the citizen, upon improvements in a navigable river, is *Monongahela Co.* vs. *United States*, 148 U. S., 312.

This Court say:

"It appears from the foregoing statement that the Monongahela Company had, under express authority from the State of Pennsylvania, *expended large sums of money in improving* Monongahela River, by means of locks and dams."

P. 324.

The United States proceeded to take the improvements *in this navigable river*, but expressly prohibited payment for a State franchise to take tolls *in the river*, of which the Navigation Company would be deprived by the Act of Congress, without compensation.

The unanimous opinion of this Court, delivered by Justice Brewer, is

"Obviously, this question, as all others which run along the line of the extent of the protection the individual has under the Constitution against the demands of the Government, is of importance; for in any society the fulness and sufficiency of the securities which surround the individual in the use and enjoyment of his property constitute one of the most certain tests of the character and value of the Government. The first ten amendments to the Constitution, adopted as they were soon after the adoption of the Constitution, are in the nature of a bill of rights, and were adopted in order to quiet the apprehension of many, that without some such declaration of rights the Government would assume, and might be held to possess, the power to trespass upon those rights of persons and property which by the Declaration of Independence were affirmed to be unalienable rights."

"In the case of *Sinnickson* vs. *Johnson*, 17 N. J. L. (2 Harr.), 129, 145, cited in the case of *Pumpelley* vs. *Green Bay Company*, 13 Wall., 166, 178, it was said that 'this power to take private property reaches back of all constitutional provisions; and it seems to have been considered a settled principle of universal law that the right to compensation is an incident to the exercise of that power; that the one is so inseparably connected with the other, that they may be said to exist not as separate and distinct principles, but as parts of one and the same principle.' And in *Gardner* vs. *Newburg*, 2 Johns. Ch., 162, Chancellor Kane affirmed substantially the same doctrine. And in this there is a natural equity which commends it to every one. It in no wise detracts from the power of the public to take whatever may be necessary for its uses; while, on the other hand, it prevents the public from loading upon *one individual more than his just share of the*

burdens of government, and says that when he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned."

"But we need not have recourse to this natural equity, nor is it necessary to look through the Constitution to the affirmations lying behind it in the Declaration of Independence, for, in this Fifth Amendment, there is stated the exact limitation on the power of the Government to take private property for public uses."

"And with respect to constitutional provisions of this nature, it was

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well said by Mr. Justice Bradley, speaking for the Court, in *Boyd* vs. *The United States*, 116 U. S., 616, 635: 'Illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be *liberally* construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of Courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. The motto should be *absta principiis*.'"

Idem, pp. 324, 325; 148 U. S.

"The language of the Fifth Amendment in respect to this matter is happily chosen. The entire amendment is a series of negations, denials of right or power in the Government, the last, the one in point here, being, 'Nor shall private property be taken for public use without just compensation.'"

Idem, p. 326.

"The theory of the Government seems to be, that the right of the Navigation Company to have *its property in the river*, and the franchises given by the State to take tolls for the use thereof, are conditional only, and that whenever the Government, in the exercise of its supreme power, assumes control of the river, it destroys both the right of the company to have its property there, and the franchise to take tolls. But this is a misconception. The franchise is a *vested right*. The State has power to grant it. It may retake it, as it may take other private property, for public

uses, *upon the payment of just compensation. A like, though a superior power exists* in the National Government. It may take it for public purposes, and take it even against the will of the State; but it can no more take the franchise which the State has given than it can *any private property* belonging to an individual."

P. 341, *Idem.*

"The Government takes it away from the company, whatever use it may make of it; and the question of just compensation is not determined by the value to the Government which takes, but *the value to the individual from whom the property is taken;* and when by the taking of the tangible property the owner is *actually deprived of the franchise* to collect tolls, just compensation requires payment, not merely of the value of the tangible property itself, but also of that of the franchise of which he is deprived."

P. 343, *Idem.*

The paramount authority to regulate commerce in a navigable river here had to pay compensation for the *vested right* of the citizen in the improvement and franchise. So here the claimants have vested right in actual use and occupancy and tillage of this plantation for over a hundred years, and in depriving them of this vested right in reclaimed land, improved and occupied, this use of their property granted and confirmed in grant by the State for a public benefit of reclamation and agriculture, the United States is equally under the obligation of the Fifth Amendment.

In *Scranton* vs. *Wheeler*, 179 U. S., 141, the decision that a destroyed access to navigability was not a taking, rested upon the distinction that there was no improvement or occupancy.

The Court below said in that case:

"A distinction exists between those cases where, under authority of the State, a structure has been placed in a navigable stream, such as a bridge, or lock and dam, as an improvement to the navigation of a stream wholly within its borders, and which is sought to be removed under the authority of subsequent congressional legislation. In such case, the improvement, being by authority of law, can only be taken for public uses upon just compensation. This is the doctrine of the case of *Monongahela Navigation Co.* vs. *United States*, 148 U. S., 312. In that case it was held that

not only must the actual property of the owner in the structure, but his franchise also, must be paid for. The plaintiff in this case before us has made no improvements for either public or private uses. No property of his has been invaded, none has been taken."

Idem, p. 146.

And this Court in holding that a denial of access to navigable water by an owner *who had not improved* or built out was not a taking of private property, carefully asserts the doctrine of *vested rights* and improvements and actual occupancy and use which would distinguish the case.

The Court say:

"The decision in *Yates* vs. *Milwaukee* cannot be regarded as an adjudication upon the particular point involved in the present case. That, as we have seen, was a case in which the riparian owner *had in conformity with law erected a wharf* in front of his upland in order to have access to navigable water. The city of Milwaukee attempted arbitrarily and capriciously to destroy or remove the wharf that had lawfully come into existence and was not shown, in any appropriate mode, to have been an obstruction to navigation. It was a case in which a municipal corporation intended the actual destruction of tangible property belonging to a riparian owner and lawfully used by him in reaching navigable water, and not, like this, a case of the exercise in a proper manner of an admitted governmental power resulting indirectly or incidentally in the loss of the citizen's right of access to navigation—a *right never exercised by him in the construction of a wharf before the improvement in question was made by the Government.*"

Idem, p. 158.

Again the vested right of possession and use of water for irrigation is recognized by the United States not only in its statutes but in its decisions as a principle of the common law.

In *United States* vs. *Rio Grande Dam and Irrigation Company*, 174 U. S., 690, this Court quotes the Act of Congress as follows:

"Whenever, by priority of possession, rights to the use of water for mining, *agricultural*, manufacturing or other purposes, have vested and accrued, and the same are recognized and acknowledged by the *local customs*, laws and the decisions of Courts, the

possessors and owners of such *vested rights* shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed."

"The effect of this statute was to recognize, so far as the United States are concerned, the validity of the local customs, laws and decisions of Courts in respect to the appropriation of water. In respect to this, in *Broder* vs. *Water Company*, 101 U. S., 274, 276, it was said:

P. 704.

"It is the established doctrine of this Court that rights of miners, who had taken possession of mines and worked and developed them, and the rights of persons who had constructed canals and ditches to be used in mining operations and for purposes of *agricultural irrigation, in the region where such artificial use of the water was an absolute necessity*, are rights which the government had, by its conduct, recognized and encourged and was bound to protect, before the passage of the Act of 1866. We are of opinion that the section of the Act which we have quoted was rather a voluntary *recognition of a pre-existing right of possession*, constituting a valid claim to its continued use, than the establishment of a new one. This subject has so recently received our attention, and the grounds on which this construction rests are so well set forth in the following cases, that they will be relied on without further argument: *Atchison* vs. *Peterson*, 20 Wall., 507; *Basey* vs. *Gallagher, Id.*, 670; *Forbes* vs. *Gracey*, 94 U. S., 762; *Jennison* vs. *Kirk*, 98 *Id.*, 453; *United States* vs. *Rio Grande Irrigation Co.*, 174 U. S., p. 704."

The colony and State of South Carolina had before the Revolution for many years encouraged this agriculture, and its peculiar industry and reclamation of these lands, by ditching, embankments and canals, and irrigation by natural flow of Savannah River. It was a part of its industrial system for nearly two hundred years, and when the United States was created there was a "pre-existing right of possession" in the occupant. The State could not now divest title and turn him out of possession. The United States which has the same but superior power (142 U. S., 341), is equally observant of private right.

And this Court concludes:

"The unquestioned rule of the common law was that every

riparian owner was entitled to the continued natural flow of the stream. It is enough, without other citations or quotations, to quote the language of Chancellor Kent, 3 Kent. Com., sec. 439: 'Every proprietor of lands on the banks of a river has naturally an equal right to the use of the water which flows in the stream adjacent to his lands, as it was wont to run (*currere solebat*) without diminution or alteration. No proprietor has a right to use the water, to the prejudice of other proprietors above or below him, unless he has a prior right to divert it, or a title to some exclusive enjoyment. He has no property in the water itself, but a simple usufruct while it passes along. *Aqua currit et debat currere ut currere solebat*, is the language of the law. Though he may use the water while it runs over his lands as an incident to the land, he cannot unreasonably detain it, or give it another direction, and he must return it to its ordinary channel when it leaves his estate."

P. 702; *Id.*, 174 U. S.

It is clear, therefore, that even if the whole of the level of this plantation were between mean high water and low water mark, still being reclaimed, protected from the river by an embankment, enclosed, in actual *pedis possessio*, in adverse possession under South Carolina statute, cultivated for one hundred and twenty years and probably longer, and by grant, by local custom, by prescription, the private property of the owner, and its chief value consisting in the natural flow of the Savannah River for irrigation, the U. S. Government has no easement in the exercise of power to regulate commerce, to actually invade this property by water backed up and to destroy it and to drive the husbandman forever from the tillage of dry land, that has been productive fields for over a century.

without compensation

TENTH EXCEPTION.

The Court erred in failing to hold that the damages resulting from the ~~possession~~ of this improvement of a navigable highway, for the public good, was not the result of a taking of plaintiffs' property, and was merely incidental to the exercise of a servitude to which the property had always been subject.

prosecution

Again it is to be remarked the error of law here assigned that the injury to plaintiffs' property was merely "incidental to the

exercise to a *servitude* to which the property has always been subject" presents a question of law and a defense which was not set up in the answer. Paragraph one of the answer being simply a denial of the title set up by the plaintiff in paragraph third of the complaint. Yet notwithstanding there was no such issue in the pleadings, which defense is an affirmative defense if it be set up at all (see authorities cited), this Court is asked to consider an assignment of error on a question of law not made in the pleadings. No servitude upon this property of any kind whatsoever is alleged by the Government of the United States in the pleadings.

As matter of fact the Court below found that the injury to the lands was not *incidental*, consequential or indirect, but was direct, the "*direct result*" of the dams and obstructions, and so far as it is a matter of fact this Court has said "we have no authority to examine testimony and make a finding of the ultimate facts" (*Lehnen* vs. *Dickson*, 148 U. S., 71, 77).

Now, in Conclusion of Law Four, p. 9, Record, the Court below held:

"If, therefore, said riparian owner suffer damage, incidental or consequential upon such improvement, he cannot, under any circumstances, treat the Government as a trespasser on *tort feasor*, and cannot, under the Fifth Amendment, demand compensation, unless there is an actual physical invasion of the real estate of the private owner, and a practical ouster of his possession. *Gibson* vs. *U. S.*, 166 U. S., 269."

P. 9, Record.

There is no error alleged in this conclusion of law by the Court below.

The Court below also found the vital facts which distinguishes this case, *i. e.*,

1. The actual physical invasion by permanent flooding of the real estate of the private owner.

2. The practical ouster of his possession.

See Findings of Fact Ten and Eleven, page 8, Record.

These findings of fact make it impossible for the Court below to find as a fact, the injury was *incidental* or consequential, which is the negative of such findings. And this Court has said it cannot disregard the findings of fact of the Court below, nor itself find the ultimate fact on error of law.

Moreover, this Court has always declared that the facts of the *Pumpelley* case (which are the same as the Court below finds

here) made the case not one of incidental or consequential injury; and in the case of *Mugler* vs. *Kansas, U. S.* vs. *Gibson*, and *Scranton* vs. *Wheeler*, quoted in full above, this Court has repeatedly distinguished, recognized and affirmed the doctrine of the *Pumpelley* case, particularly pointing out and stating the crucial facts, by which it was held not incidental or consequential, to wit:

(1.) Actual in. .sion.

(2.) Permanent flooding—destruction.

(3.) Practical ouster of possession.

The Court below, therefore, could only hold as it did, on the ultimate facts found, and was following strictly the language of this Court.

Again, as matter of law, dealing with the legal merits of the exception, it has never been held that there is a servitude in the United States Government to *back up water* on lands on a navigable river and permanently flood the lands bordering on a navigable stream in the exercise of its power to regulate commerce. On the contrary, this Court has repeatedly held to the contrary. In the first and leading case of *Pumpelley* vs. *Green Bay Co.*, 13 Wall., 166, this Court disposes of such a plea in these words: "It is alleged that this title came to the plaintiff burdened with an *easement* in favor of improving the navigation of the Fox River, which authorized *the injuries complained of*, and of which, therefore, he could not complain," to which this Court say, "that the absolute ownership and right of private property in such lands is not varied by the fact that it borders on a navigable stream," and against the affirmative plea of such easement held that the flooding of such lands must be compensated under the Constitution.

In *Gibson* vs. *U. S.*, 166 U. S., 269, the Court affirms the doctrine of the *Pumpelley* case, carefully distinguishing the *Gibson* case, on the ground that the farm, either in upland or submerged land, was not actually invaded by the water as it was backed up and the plaintiff remained in continued use and full possession and agriculture, but that the only result was a diminished access and solely an inconvenience.

The ultimate fact found by the Court below, in that case, was:

"VIII. There was *no water thrown* back on claimant's land by the building of said dike, and that said dike has not itself come into physical contact with claimant's land, and has not been *the cause of any such physical contact in any way.*"

All that was found was that "claimant's access to the navigable portion of the stream was" (partly but) "not entirely cut off."

Finding VII. of Facts, 166 U. S., 269.

This Court say:

"The Fifth Amendment to the Constitution of the United States provides that private property shall 'not be taken for public use without just compensation.' Here, however, the damage of which Mrs. Gibson complained was not the result of the taking of any part of her property, whether upland or submerged, or *a direct invasion thereof*, but the incidental consequence of the lawful and proper exercise of a governmental power."

"The applicable principle is expounded in *Transportation Co.* vs. *Chicago*, 99 U. S., 635. In that case, plaintiff being an owner of lands situated at the intersection of La Salle street in Chicago with the Chicago River, upon which it had valuable dock and warehouse accommodations, with a numerous line of steamers accustomed to land at that dock, was interrupted in his use thereof by the building of a tunnel under the Chicago River by authority of the State Legislature, in accomplishing which work it was necessary to tear up La Salle street, which precluded plaintiff from *access* to his property for a considerable time; also to build a coffer dam in the Chicago River, which excluded vessels from access to his docks; and such an injury was held to be *damnum absque injuria*. This Court said, again, in speaking through Mr. Justice Strong: 'But acts done in the proper exercise of governmental powers, and *not directly encroaching upon private property*, though their consequences may impair its use, are universally held not to be a taking within the meaning of the constitutional provision. They do not entitle the owner of such property to compensation from the State or its agents or give him any right of action. This is supported by an immense weight of authority. Those who are curious to see the decisions will find them collected in Cooley on Constitutional Limitations, page 542, and notes. The extremest qualification of the doctrine is to be found, perhaps, in *Pumpelley* vs. *Green Bay Co.*, 13 Wall., 166, and in *Eaton* vs. *Boston, Concord &c. Railroad*, 51 N. H., 504. In those cases it was held that permanent flooding of private property may be regarded as a 'taking.' In those cases there was a physical invasion of the real estate of the private owner, and a practical ouster of his possession. *But in the present case there was no such*

invasion. No entry was made upon the plaintiff's lot. All that was done was to render for a time its use more inconvenient."

And this exposition of the law is again repeated in *Scranton* vs. *Wheeler*, 179 U. S., 156, which was a case of access to navigable stream also.

Thus it appears the doctrine of the *Pumpelley* case has always been maintained, where there was an actual direct invasion and destruction of the real estate by water backed up, and a practical ouster of possession, which is the case here on the ultimate facts found by the Court below. In the light of these adjudications by this Court, the Court below did not err in failing to hold the destruction of the rice plantation "incidental."

J. P. KENNEDY BRYAN,
Counsel for Defendant in Error.

Nos. 45 and 59.

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REPLY BRIEF OF DEFENDANTS IN ERROR.

Reply Brf. of Bryan & Mitchell for D. E.

SUPREME COURT OF THE UNITED STATES.

Filed Oct. 30, 1902.

OCTOBER TERM, 1902.

THE UNITED STATES, PLAINTIFF IN ERROR,
against
ARTHUR LYNAH, ET AL., DEFENDANTS IN ERROR. } No. 45.

THE UNITED STATES, PLAINTIFF IN ERROR,
against
CHAS. A. WILLIAMS & AMELIA S. WILLIAMS,
DEFENDANTS IN ERROR. } No. 59.

WRIT OF ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA.

REPLY BRIEF OF

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CHARLESTON, S. C
Walker, Evans & Cogswell Co., Printers
3 Broad Street
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5856

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Writ of Error to the Circuit Court of the United States for the District of South Carolina.

Reply Brief of
J. P. K. BRYAN,
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In reply to the Brief filed by the distinguished counsel for the United States, we desire to call the attention of the Court to the following points—the first of which is—

THE EXTENT OF OUR TITLE.

In the discussion of the extent of the title of the plaintiffs, counsel for the Government has overlooked altogether the pleadings and facts found by the Court below, which amount to a verdict of a jury on a question of title and location. By the pleadings, paragraph three of the complaint, petitioners allege that they are owners as tenants in common of a certain plantation, and particulary allege as follows :

"A certain tract or parcel of which said plantation, containing four hundred and twenty (420) acres, more or less, *which is delineated on a map of said plantation, and enclosed within red lines.*" (Lynah case.)

By reference to this map of the plantation, the *locus in quo* is set forth by this plat, both in reference to the other lands, and also to the Savannah Back River.

As to this allegation, the Answer, (Transcript of Record, page 5,) is a denial of information sufficient to form a belief. This, under the South Carolina Code, is a issue of the title as to the premises particularly described.

On this issue of fact the Court finds :

"III. Edward Lynah, the father of the plaintiffs, at the time of his death, and for many years previous thereto, *was the owner in fee simple* of a plantation on Savannah River, in the State of South Carolina, known as Vernezobre, containing about 2,100 acres of high land and rice land. He held this plantation under sundry successive mesne conveyances connecting his title with a grant of the said land by the Lord Proprietors of South Carolina, in 1736."

"IV. A certain parcel of this plantation, measuring about 420 acres, has been reclaimed by drainage, and had been in

"actual continued use for seventy years and upwards as a rice "plantation, used solely for this purpose."

"It appears from the plats among the muniments of plain- "tiff's title that these *rice lands were reclaimed and enclosed, and "in a state of culture, one hundred and twenty years ago, and "probably longer.*"

And in the Williams case, the petition alleged that :

"A certain tract or parcel of which said plantation, containing "four hundred and four and 53-100 acres, more or less, which "is delineated on a map of said plantation, and enclosed within "red lines, hereto annexed and made part of this complaint, has "been, for seventy-five years and upwards, a rice plantation on "Savannah Back River."

Williams Case, Transcript, page 2.

Finding of Fact Two is :

"II. The plaintiffs are * * the owners, *in fee simple,* as "tenants in common of a plantation on the Savannah River, "known as "Beach Hill," containing 1,486 acres of high and "rice land."

Williams Case, Transcript, page 8.

"A portion of this plantation is on the fresh tidal waters of "the Savannah River, the surface of which land lies between "high and low water. *This portion* (i. e. the rice lands, "the *locus in quo* here,) was granted by the Lords Proprietors of "South Carolina in 1738, and the grant thereafter confirmed by "Act of the Legislature of South Carolina. It has been for "over a century protected from the river, or any invasion of "tidal water, by an embankment, and cultivated by the plain- "tiffs since their ownership of the said plantation in 1876, up to "the time of the abandonment thereof."

Williams Case, Transcript, page 13.

The grant referred to was a grant from the English Crown, (*See Transcript No. 59, Williams Case, p. 13, referring to Finding in Lynah Case, No. 45, p. 15, fol. 30,*) and the Act confirming same is the so called Act of Peace, now to be found as Section 2361 of Code of Laws of South Carolina, 1902.

From this *finding of fact* of title and in location of grant, and extent of title, there is no assignment of error, and there could

be none. Yet the counsel for the Government attempt now to argue the question in this Court.

TENURE OF THE RICE LANDS.

The counsel for the Government states the South Carolina rule as follows (his brief, p. 19) :

"The State *had, in the beds of these tidal channels,* not only "title as property, the *jus privatum,* but something more, the *jus* "*publicum,* consisting of the rights, powers and privileges "*derived from the British Crown,* and belonging to the governing "head, which she held in a fiduciary capacity for general and "public use; in trust for the benefit of all the citizens of the "State, and in respect to which she had *trust* duties to "perform. *3 Kent, 377; Martin v. Waddell, 16 Peters, 367;* "*Commonwealth v. Roxbury, 9 Gray, 451; State v. Pacific, 22 S. C.,* "*48, 83.*"

But the counsel for the Government omits the balance of the sentence, which declares that these "beds of tidal channels" which the State holds in trust, are below *low water mark.*

The omitted words are :

"The absolute rule heretofore referred to, limiting land "owners bounded by such streams to the high water mark, "*unless altered by law, or modified by custom,* accords with the "view that the *beds of such channels below low water mark* are not [illegible] grant to

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"actual continued use for seventy years and upwards as a rice "plantation, used solely for this purpose."

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In addition to the acts of South Carolina confirming the grants of Lord Proprietors, sections 1873, 1875, Rev. Stat. S. C., quoted pp. 13, 14 of Brief in Lynah case, there is the further confirmatory act of South Carolina, known as the Act of Peace, now section 2361, Code of Laws of South Carolina (1902), confirming titles in all persons who had been for five years prior to July 4, 1776, in quiet, peaceable possession, which act would be a further confirmation of title, whether by grant of the Crown of England or by the Lord Proprietors.

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The omitted words are :

"The absolute rule heretofore referred to, limiting land "owners bounded by such streams to the high water mark, "*unless altered by law, or modified by custom,* accords with the "view that the *beds of such channels below low water mark* are not "held by the State simply as *vacant* lands, subject to grant to "settlers in the usual way through the land office."

Id., p. 84.

There is a distinction between the "*beds* of tidal channels," and the "shore."

Gould on Waters gives the precise definition:

"Every river consists of : (1) the bed; (2) the water; (3) "the banks or shores." (p. 98.)

"Shore is strictly applicable only to the space between ordinary high and low water mark in a tidal river. (p. 98.)

It thus appears from the counsel's own citation that the State is not a trustee for the public in the shore, but such is a subject of private ownership.

This now fully and conclusively appears in the decision of the Supreme Court of South Carolina in refusing the petition for a rehearing of that case, and when, on this very point, as to limit of "private ownership," they said :

"Certain grants from the State (1869) covering marsh lands "lying between high and low water mark were in evidence. "The legality of these grants was not contested; *but they had "not been located;* and it was not known to the Court whether "there were any marsh lands on South Wimbee Creek, which "these new grants did not cover. Being thus without informa- "tion on that subject, this Court could do no more than state "the general rule as to the extent of PRIVATE OWNERSHIP in "lands bounding on navigable tidal streams, and indicate "the "limit," to which the *grants, if located,* could carry the title of "defendants. That is to say, to declare the line to be an ordi- "nary high water mark, *except where the grants may cover the "marsh;* and where they do so, to declare the line of *low water "mark,* called for by them, as "the limit of defendant's right," "leaving, in either case, the *bed proper,* or bottom, *below low "water mark,* as the property of the State. The petition for a "rehearing is refused."

The State vs. Pacific Guano Co., 24 S. C., p. 598.

The Court below, in this case, found as an ultimate fact, that the land located within the red line of the plat was the land embraced in the grant. The Court below has, on all the evidence before it, *located the grant,* and a question of location is one of fact for the jury, the Court below, in this case, and its verdict is conclusive.

The "private ownership," therefore, in this case, as found by the Court below, was within the limit of private ownership, leaving the "bed proper," ~~between~~ low water mark, the property of the State. It is "these beds of tidal channels" that the State holds in trust, and not the shore.

In 22 S. C. 600, Oak Point Mines Case, approved by the Supreme Court of South Carolina and ordered printed by that Court as a full and clear historical exposition of the law of

lands between high and low water level, the learned Judge says:

"That land flowed by the tide is the subject of grant in this "State is conclusively shown by statutes in which 'all lands "granted in this State' were classified and rated for pur- "poses of taxation. The first of these was the Act of 1784 "(4 Stat. 627) to raise supplies. This classification was con- "tinued in the Supply Acts of each succeeding year until 1815, "when it was made permanent by 'An Act to fix the value of "lands in this State for Taxation,'' &c. (6 Stat., 7.) In these "Acts '*tide swamp* not generally affected by salt or freshets' and "'salt marsh,' proved to be 'incapable of immediate cultiva- "tion,'' are set down, the *first taking rank as the most valuable "land in the State.* There is no trace of any special legislation "providing for the location and grant of lands of this character, "and the necessary inference is that they were disposed of "under the general regulations prescribed by the statutes re- "lating to *vacant lands.*"

"An Act of 1714 (7 Stat., 61 and 62, sections 3 and 5) "recognizes claims of individuals, under grant or conveyance, "to sundry lots on the bay in Charleston, 'from *high to low water* "'*mark,*' and imposes penalties and forfeiture for neglect by "such claimants to build their proportion of the sea wall. An "Act of 1719 (7 Stat., 69, sec. 20,) reciting that owners of "front lots on the bay were discouraged from building their "part of the sea wall by reason of others claiming lots before "them to *low water mark,* provides a mode of adjusting disputes "and declares that upon failure of the claimant of the lower "lot to present his claim within a stated time, said lot should "be vested in the owner of the front lot, 'he paying to the "owner of the lot to the eastward from high to low water mark "his full charges that he was at for his *grant* for the same,'' &c. "And section 22 provides that 'upon the title to the front and "lower lots becoming vested in the same person, they should "not again be separated, and if the front lot should be disposed "of by sale or gift, the other should go along with it as an "appurtenance.''

"These citations from our statutes are, to my mind, conclu- "clusive of the question under consideration. They show un- "mistakably that lands below high water mark in tidal navigable "rivers have been uniformly recognized by the Legislature as "embraced within the description of vacant lands, and subject "as such to location and grant under the general regulations of "the land office.''

"My conclusion is that defendants have valid title under the "grant of 1869 to Henry M. Stuart, (from whom they de-"rived), to the soil between ordinary high water and low water "mark in said creek, embraced within the lines of said grant. "As to the title to the *bed of the creek* below *ordinary low water "mark*, I hold that it is in the State."

It appears in this review that the "tide swamp" not affected by salt, i. e., the fresh water tidal swamps, such as these rice lands are, were considered the most valuable lands in the State, and taxed as such; and indeed they were the basis of the agricultural industry, because it produced its chief staple, rice.

In the *Gibson* case *the law of the State of Pennsylvania*, as quoted by this Court, was as follows:

"The owner of lands bounded by navigable water has the "title in the soil between high and low water mark, subject to "the public right of navigation, and to the *authority of the Leg-"islature to make public improvements upon it, and to regulate his use of it." 166 U. S. p. 273.*

The case arose in Pennsylvania and the title to the defendant depended upon that law, whereas in the South Carolina case we have seen the policy of the State has been to grant the land between high and low water mark absolutely, and the trust for the public as declared by the State in its decisions was in the "beds of tidal channels" and "beds proper" of navigable streams and not in the flats or shores thereof, which were grantable of course in fee simple to all settlers, from the land office.

The State of South Carolina in addition has declared by statute that the only tenure of lands is free and common socage. Sec. 1872, Rev. Stat., 1893.

This is without any public easement whatsoever upon her grants.

It is absolute private property. It is not a revocable privilege or license.

In effect the title between high and low water is the same as that of Massachusetts, as described by the *Court in Commonwealth vs. Alger*, and affirmed by this Court in cases cited in our main briefs.

In *Commonwealth v. Alger, 7 Cush., 71,* speaking of the property as "propriety" in these flats, the Supreme Court say :

"But, however, this may be, we think it manifest, from the "whole tenor of their legislation, that when the early settlers of "Massachusetts, holding their lands under the freest and most "liberal English tenure, that of tenants *in fee simple in free and "common socage,* were making provision for granting and taking "titles to real estate for themselves and their posterity, and "when a certain valuable right and interest was annexed to and "made part of such grants of estate by the Government compe- "tent to impress such character upon it, they understood, both "those who made and those who proceeded to take titles and "settle the country under such grants, that the grantees acquired "a legal right and vested interest in the soil, and not a mere "permissive indulgence, or gratuitous license, given without "consideration, and to be revoked and annulled at the pleasure "of those who gave it."

We have seen that under the Massachusetts law, as long as the flats were unreclaimed, there was a public right of navigation, and this Court has decided that upon enclosure and tillage, the *"public right* of navigation *'ceased.'* " Same is also true as to South Carolina law upon the rule as stated by the Courts of South Carolina.

As an illustration of the law of the State of South Carolina, and her attitude as to absolute private ownership of land between high and low water mark—that is, out to the channel to the point of navigability, we refer to the following Statutes :

"VI. And be it further enacted by the authority aforesaid, "that the present proprietors of wharves and low water lots in "Charleston, shall have the exclusive privilege, for six months "after the passing of this Act, of obtaining grants for the land "covered by the water in front of their present wharves and "low water lots, as *far as the western edge of the channel* of "Cooper River, and the northern edge of the channel of Ashley "River."

Vol. V, Statutes of S. C., page 39, Act of 28th day of March, 1787.

A great part of the city of Charleston is built on these low water lots, as is Boston.

But such lots were always regarded as private property, not to be taken, except upon just compensation, as appears by the following Statute :

"VII. That no person, being the owner of any low water "lot or lots, within the corporate limits of the city of Charles- "ton, on the *edge* of Ashley or Cooper River, shall be allowed "to use the same, in any manner, that may be injurious to the "health, comfort or convenience of the citizens; and the City "Council is hereby authorized to make such regulations, and "pass such ordinances, in relation to this subject, as may be "necessary and proper; *provided, always,* that *private property* "shall not be taken for the public use by the City Council as "aforesaid, *without just compensation.*"

Vol. VII, Stat. S. C., page 151, Act of December 21, 1836.

The "private ownership" absolute and free from all easement or servitude, could not be more strongly expressed, in this recognition of the principle of "private property" in these tide lots protected by the common law principle of the Fifth Amendment, compensation for their taking.

Servitude in Issue in Pumpelly Case.

The counsel for the Government dismisses the Pumpelly case, and its binding force, as *stare decisis,* in these words :

"There was no question of a superior or other title." "* * * "There was involved no prerogative right, no trust "for the public use." (Brief, plaintiff in error, p. 27.)

Now, this is wholly incorrect. The affirmative plea of *easement* for improvement of navigation was set up in the answer, and passed upon by the Court.

By reference to the case, the Court will find, that at pages 170-171, this Court said, in stating the issues, as follows :

"It is further alleged that the dam was built under the authority "of laws of the United States, and for improvement of the navi- "gability of Fox and Wisconsin Rivers, * * * that the "Laws of Congress, and of the State, granted the *easement* right

"and privilege of overflowing the lands described to the extent "necessary to improve the navigability of said rivers. That "the United States patented the land, * * * and *plaintiffs* "*purchased, with full notice of, and subject to the easement* "and right aforesaid."

And also at page 182 this Court, in deciding the issues, said as follows :

"It is alleged that this title came to the plaintiff burdened "with an easement, in favor of improving the navigation of "the Fox River, which authorized the injuries complained of."

And this Court overruled such defence, saying, that the United States

"Retains no right to take that land, without just compensa- "tion," and "the absolute ownership and right of private prop- "erty in such land is not varied by the fact that it borders on a "navigable stream" (p. 182).

In the light of this issue, clearly made and decided by this Court in the Pumpelly case, it is futile for the counsel for the Goverment to attempt thus to dispose of this case.

PRIVATE OWNERSHIP UNDER ENGLISH LAW.

The counsel for the Government seems to question the title by usage or prescription. That there is a title by prescription or usage of such lands appears, however, from his own brief, page 15 :

"*Except* so far as an individual or corporation has acquired "rights in it by express grant, or by prescription or usage," and "cites many authorities."

Independent of any question that arises as to the grant or paper title, the facts in this case make a case of prescription and usage.

Again, at page 16, counsel admits

"There can be no doubt that in England a subject may be "the owner of a portion or tract of the shore by ancient charter "or grant."

The counsel for the Government admits in his brief, at page 22, that by the law of England the subject can be, in the language of Lord Hale, owner of the shore by prescription, or grant, or usage; but he contends, at page —, that he cannot be owner of the shore in a port or harbor.

This is not the case in the State of South Carolina; for by the Act of 1787, we have seen that low water lots at Charleston, of the Ashley and Cooper Rivers, to the edge of the channel, could be taken up by the owners, and when so taken up, interference of the State thereafter was in recognition of the right of private property, and of the doctrine of eminent domain, and just compensation being made for the taking of private property.

This doctrine of title in fee simple out to the edge of the channel—that is, to the point of navigability, is recognized in the Chicago Lake Front Cases—Illinois Central R. R. vs. Illinois, 146 U. S.—and is in accord also with the Massachusetts law of title in fee simple of flats, that when reclaimed, the public right of navigation ceases.

Now, there is no evidence or finding that this swamp was originally or ever part of a port or harbor. Moreover, it must be remembered that this rice land was, in part, as matter of fact a tidal fresh water cypress swamp, not affected by salt, (See McCrady's History) down to the present embankment on the river, it never was part of a port or harbor, and that there never was any right of fishery or navigation through this tidal fresh water cypress swamp, but only in the tidal channel of the river; that is, in its "bed proper." Indeed, as a matter of fact, the public right of navigation has never been shown to exist, or have been exercised at any time in or through these fresh water tidal cypress swamps, bordering on the Savannah River, which are a dense jungle, from the river bank upward.

It nowhere appears in this case that there ever was at any time in these cypress swamps any existing actual navigation by any person in its natural state. These rice fields are 12 miles above Savannah, are on the Back River, and do not border on the harbor.

For this Court has itself said, that "we know judicially the

fact that the harbor is the river 'in front of the city' "—speaking of Savannah.

S. C. vs. Georgia, 93 U. S., p. 13.

RULE IN CHICAGO LAKE FRONT CASES.

The counsel for the Government states as the rule, in Illinois Central R. R. Co., 146 U. S.:

"That the State could not abdicate the trust for the public in "any water ever covered by the tide, between high and low "water."

We have cited this case in our brief, but counsel omitted the exceptions as recognized by this Court, which is, the law on this case, which are in the following words :

"Portions of submerged shoals and flats" (p. 457) "parcels "which, being occupied, do not substantially impair the public "interest in the lands and waters remaining" (p. 452).

And counsel again has overlooked the fact that the law of the trust in the Sovereign, as declared in that case by this Court, and recognized ever since, was that the Illinois Central R. R. in so far as it had acquired and actually built upon the water lots of the lake, "out to the point of navigability," had a vested right, and this Court, confirming their title and absolute exclusive use and possession of the same as not inconsistent with trusts for public navigation in the State of Illinois, as sovereign trustee, enforced the trust for the public right of navigation as incapable of alienation only in those lands beyond the *point of navigability.*

(See 146 U. S., p. 464.)

This accords with the doctrine of the State of South Carolina, that trusts for the public is in the "beds of tidal channels," and not of the shores or flats between high and low water mark, which is capable of improvement and tillage by the citizen, under sanction of the Government, and such became private property absolutely.

THE IMPLIED CONTRACT IN THIS CASE.

The counsel for the Government citing the case of *South Carolina vs. Georgia, 93 U. S., 4,* claimed that the same conditions and facts exist in that case as here. This is again incorrect. That was the case of a State asserting a compact with a State. This is a case of a citizen asking protection under the Fifth Amendment to the Constitution. In that case the Supreme Court asserted the paramount authority of the United States in improvement of its rivers; that the national legislature was beyond the control of the Courts as to their plans for the improvement of navigable rivers. That the acts of the Government in erecting dams "to divert the water from the northern channel into the southern channel is in the judgment of the law no illegal obstruction," 93 U. S., 14, and concluding the Court say: "It is sufficient for the present case to hold, as "we do, that the acts of defendant of which South Carolina com- "plains are not *unlawful*, and consequently that there is no "nuisance against which an injunction should be granted." P. 14.

That is the exact attitude of these plaintiffs here, that the acts of the U. S. Government are not *unlawful*, because the United States have supreme power to regulate commerce, but in the exercise of that supreme power our contention is that the limitation of the same Constitution, which gave them the supreme power, is the limitation in the Fifth Amendment. And although this Court could not by injunction stop the Government in execution of any of its plans for the purposes of improvement of any navigable river, yet still when the Government of the United States in the exercise of its supreme authority to improve navigable rivers takes private property within the meaning of the Constitution this Court will award just compensation.

We are here under the whole Constitution of the United States, and we not only admit the doctrine of *South Carolina vs. Georgia, 93 U. S., 4,* and *Wisconsin vs. Duluth, 96 U. S., 379,* but we insist on it. It is part of our case.

We have in our petition and complaint alleged what this Court in those cases held, that "these acts of the Government of the "United States have been done, and are being done, *lawfully* "by the officers and agents of the United States, under

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"authority of the United States in the exercise of its powers of "eminent domain and regulation of commerce under the Con- "stitution of the United States and laws of Congress," etc., (paragraph 7 of the Complaint.)

It is upon such allegation of the supreme power *lawfully* exercised and of the limitation of the powers in the Fifth Amendment, that our cause of action, an implied contract, is founded, and the Court below so held, following this Court in its own decision.

An implied contract arises, by operation of the law, out of the statement of our case, as alleged in the complaint; that is, the *lawful* taking by the Government of our private property in exercise of the power to regulate commerce and eminent domain, and of the limitation thereof.

Without condemnation on the part of the Government, and without proceeding of any kind, this Court held that such implied contract arose to pay just compensation, whenever the Government took private property, although it was not within the contemplation of Congress, or of the original surveys made under the Act, that such property should be taken; and where, without condemnation of what is necessary for the Government plans, property was in effect actually taken.

In the United States vs. Great Falls Manf. Co., 112 U. S., 645, the Supreme Court U. S., held :

"Where property to which the United States asserts no title "is taken, by their officers or agents, pursuant to an Act of Con- "gress, as private property, for the public use, the government "is under an *implied obligation* to make just compensation to the "owner."

"Such an implication being consistent with the Constitutional "duty of the Government, as well as with common justice, the "owner's claim for compensation is one arising out of *implied* "*contract,* within the meaning of the Statute defining the juris- "diction of the Court of Claims, although there may have been "no formal proceedings for the condemnation of the property "to public use."

"The owner may waive any objection he might be entitled "to make, based upon the want of such formal proceedings, "and, electing to regard the action of the Government as taking

'under its sovereign right of eminent domain, may demand just 'compensation for the property.''

And in *Great Falls Manufacturing Company v. The Attorney General, 124 U. S., 581,* this Court again affirmed this doctrine of an implied contract, and say :

"So that, if the Secretary of War, who was invested with "large discretion in determining what land was actually required "to accomplish in the best manner the object Congress had in "view, *found it necessary to take,* and has taken and used, and "still holds lands of the plaintiff for the proposed dam, which "happen *not* to be covered by the survey and map, *the United "States are as much bound to make just compensation therefor, as if "such lands had been actually embraced in that survey and map.* "Of course we are not to be understood as saying that the "Secretary of War could, by any act of his, bind the United "States to pay for lands taken by him which, manifestly, had "no substantial connection with the construction of the dam "across Conn's Island to the Virginia shore. It is sufficient to "say that the record discloses nothing showing that he has "taken more land than was reasonably necessary for the purposes "described in the Act of Congress, or that he did not honestly "and reasonably exercise the discretion with which he was "invested; and, consequently, the Government is under a Con- "stitutional obligation to make compensation for any property "or property-right taken, used, and held by him for the pur- "poses indicated in the Act of Congress, whether it is embraced "or described in said survey or map, or not."

United States v. Great Falls Manufacturing Co., 112 U. S., 645, 656.

See also *U. S. v. Jones, 109 U. S., pp. 513-514.*

Actual Loss to Plaintiffs.

The position of counsel that the owners of these lands have suffered no pecuniary loss, that they have enjoyed these lands *"without money and without price,"* (p. 29 Brief Plaintiff in Error) is a bare assertion to support which there are no facts found in the record and none in history. On the contrary the historical fact is and the record evidence below was that these grants were upon express condition of immediate reclamation of these lands, and on a rent reserved, and the reclamation of these lands has

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been the most costly in the whole history of the settling of this country and its agricultural life. Rice was for a century the chief staple of the Carolinas. Rice cultivation is a most costly and elaborate agriculture. The reclaiming of these fresh water tidal cypress swamps and jungles of the Savannah River and others, was the labor of many years and at great cost.

McCrady, the historian, says: "Rice soon became the staple "commodity of the province." "The wet deep mirey soil of "the cypress swamp, in which rice was found to grow so luxu- "riantly, especially when turned in cultivation."

McCrady's History of South Carolina, 349. South Carolina under Proprietory Government.

The records of this Court in the case of King vs. United States, No. —, shew that Associate Justice Wayne of this Court sold 400 acres of this land for forty-four thousand dollars.

The present plaintiffs paid large values for this rice land and the Court finds its value $10,000. This is hardly "without money and without price."

Impossible Extreme of Government's Position.

The position of the counsel for Government at page 28 of his brief is that the State had property rights in this land in trust, they were never surrendered and they could not be, and when the United States reached out her hand and took possession of them an inferior right had to yield even to extermination. (pp. 28-9 Counsel's Brief.) And "that the Government "could take possession of these rice fields and erect structures "on them without compensation." (p. 22 Brief Plaintiffs in Error). This is in direct contradiction to the decision of this Court in the Chicago Lake Front cases, 146 U. S., in which this Court held that the reclamation and occupation of lands after out to the point of navigability in the lake there was thereafter no trust in the State, and that the same was private property, and that its absolute alienation was consistent with the law of the trust in navigable waters held by the State and the United States.

The doctrine announced by the counsel for the Government would lead to this proposition, that is, that if the United States wishes to erect a light house on the site of lands which in the Chicago Front cases were by this Court confirmed in absolute title and possession and use to the railroad company, and reached out its hand to take possession of the railroad depot and structure or site of Illinois Central Railroad, that the right of the railroad would have to yield even to extermination! This is the *reductio ad absurdum* of counsel's position.

without compensation

The reason of the rule as expressed in counsel's brief, p. 17, quoted from the Chicago Front cases, was "So also by the com-"mon law the doctrine of dominion over and the ownership by "the Crown of lands within the realm under the tide water, is "not founded on the existence of the tide over the land, but "upon the *fact that the waters are navigable,*" but when in fact the lands were originally a cypress swamp and by reclamation are fields of grain, and when the fact is that they are *not navigable waters*, there cannot be any dominion when the reason for dominion ceases.

Again, at page 17 of his Brief, counsel for the Government quotes from the Chicago Front cases, "the doctrine is founded "upon the necessity of preserving to the public use the use of "navigable waters from interruption and encroachment," but the fact in this case is these are not navigable waters and there is no necessity for preserving to the public the use of navigable waters in this case, because there is no possibility of navigation in rice fields, and no obstruction to navigation. On the contrary the Court below expressly found, ¶ 9, fol. 20, Lynah case:

"For the purpose of the Government that water in the river "must be raised. The banks of this plantation materially as-"sisted this operation, for by their resistance the water is kept "in the channel."

It appears therefore that instead of being an encroachment or an obstruction, the banks are an aid to navigation; in the language of Ill. Cent. R. R. vs. Illinois, 146 U. S., 457:

"It is also true that portions of the submerged shoals and "flats which really interfered with navigation could better "subserve the purposes of commerce by being filled up and "reclaimed."

So that our case falls within the rule and the policy of the rule announced by this court. In addition the court below expressly found that "the whole rice culture of South "Carolina is founded on this system, and the policy of the "colony and the State has been to grant such lands for rice "culture" (*Finding VI*, page 7, Lynah case). That is, it was a fixed policy of Government for developing its agriculture in its chief staple, rice. Upon this policy of centuries rest vested rights and the rule of property which are invoked by defendants in error here.

MONONGAHELA CO. CASE.

The counsel for the Government referring to the Monongahela Navigation case, sums up the decision in that case to the effect that this court held only that the Government should make just compensation "for *all* it took possession of" (page 28, Brief of Plaintiffs in Error).

Now, this is just the contrary of what this court did decide. The facts, as we have shown in our main brief, were that that case arose upon the validity of a special provision of the river and harbor act of Congress, providing that the United States should *not* pay for the franchise of which it deprived the Monongahela Company and of which the United States did not seek any possession, and had and could make no use of, in fact did not need in any way the State franchise for the accomplishment of its purpose. The United States did not take possession in any sense. It simply *deprived* the Monongahela Company of the use of the State franchise. It simply

destroyed it, and yet for the deprivation of the use of this franchise and the complete destruction of that for which the United States did and could have no use whatsoever this court held that the United States should make just compensation, notwithstanding Congress had expressly enacted that it should not do so.

It will not do to dispose of this case and its principle and precedent as applicable to the case at bar by endeavoring to sum it up in the inaccurate phrase that the United States should make just compensation "for *all* it took possession of."

DIVERSION OF WATER—*A Hypothetical Case.*

The suggestion is made in the brief of the Government, page 32, that the Government could divert the water of this channel of the Savannah river, and that an equal question might arise as to just compensation to be paid for injuries occasioned by such diversion of water (page 32), and that such injuries would plainly not be the taking of any property. This suggestion, however, raises a question altogether distinct from the question at bar. We may say, however, that in the case of *Gardner vs. Newburgh* Chancellor Kent granted an injunction for the diversion of water of a certain stream on the ground that the same was a taking of the owner's property without compensation, and that this case is cited with approval by this court in the case of *Pumpeley vs. Green Bay Company*, in *13th Wallace, pages 180–181.* We may also call attention to the words of this court in the case of *Kaukauna Water Power Company vs. The Green Bay and Mississippi Canal Company, 142 United States, page 254*, in which this court held that "so far as land is taken for the purpose of the improvement either for the dam itself or the embankment or for overflow, or *so far as water was diverted*

from its natural course or from the uses to which the riparian owner would otherwise have been entitled to devote it, such owner is undoubtedly entitled to compensation" (page 276).

When this question of diversion of water arises it will be time enough to decide it specifically, but such is the attitude of this court upon like questions that have already been before this court.

If there had been a diversion of water in this case so as to have deprived the claimant of the irrigation of the rice fields and thus destroyed the land so far as rice culture is concerned, it would still have left the land dry land, upon which, as heretofore, all grain crops—that is, corn, wheat, oats, barley—and all vegetables and grass crops could have been grown; it would also have been fit for grazing and the habitation of man. Only one of its possible uses, *i. e.*, rice culture, needing irrigation, would have been affected by the diversion of the water.

But in the case at bar, by the permanent flooding of these rice fields and the destruction of them for all agriculture whatsoever, and reducing them to an irreclaimable bog on which neither man can work nor animal plow, as found by the court below, they are absolutely and altogether destroyed, and the owner altogether put out of possession.

This court has, upon this state of actual facts now presented in this case, decided the exact principle in the *Pumpeley case*, and it is therefore of no help to speculate upon what might be decided on another state of fact.

ATTORNEY GENERAL *vs.* PARMETER.

In re Portsmouth Harbor, 10th Price, 378 to 464:

This case cited by the Government as to the nature and extent of the grant under the Crown was for the abatement of a nuisance in the harbor of Portsmouth. The

information distinctly states that the *locus in quo* "was a place which hath been commonly used for the mooring of His Majesty's ships, called the King's moorings" (page 379). "And that His Majesty's ships of war and other ships, vessels and boats had free passage, and did or might cast anchor and lie there." "That they have been used or enjoyed or have been free and open for the passage and repassage, anchorage and lying of ships or vessels and boats as a part or parcel of the harbor or port of Portsmouth aforesaid" (pp. 381, 382).

The information further alleged that the erections of the defendants were a nuisance and injury to said harbor and would greatly endanger the loss of the said harbor and would destroy the said harbor or render the said harbor useless, so that His Majesty's ships and vessels and other ships and vessels and burden would not be able to come into or go out of the said harbor as they had always been used to do; or if such ships and vessels should be able to come into or go out of the said harbor, the same would not be able to remain long there or ride with any safety" (p. 383).

"Soon after the defendants began to make such erections and works, they had notice from the commissioners of the navy that such erections and works if completed, would be injurious to said harbor, and were requested to desist and remove the same" (p. 383).

"And that the defendants disregarding such notice, finished said erection to the great prejudice and damage of His Majesty's navy and to the great injury of the said port or *harbor* of Portsmouth and more especially to the mooring of His Majesty's ships at the place called the King's moorings aforesaid" (p. 384).

"That no person or persons have or had been in possession of such part of the said harbor under color or pretense of the alleged grant claimed by the defendants, until the

defendants began, in 1784, to make such erections" (p. 387, also p. 390).

The alleged grant was in 1628 and nothing was done thereunder until 1784.

And particularly the said information alleged "that before the year 1784 the defendants did not make any erection or *exercise any act of ownership* in or upon the same nor take any rent, issues or profit, or derive any benefit therefrom."

The exchequer court in delivering judgment rested the same upon the ground that it is clearly laid down that *ports creeks, and havens* are subjects of the public right and they describe what these are: "A port more immediately accommodated of protection both natural and artificial. A haven which itself is naturally protected and where ships may ride or lie in safety. A creek, a member of a port where there is no custom-house or comptroller, but where there are certain officers for the purpose of collecting the King's revenues. In none of these places, therefore, can the public right be waived, although there might be a grant of the soil."

Again the court founded its judgment upon the express finding of fact that "the erections were a nuisance and detrimental to the *harbor* of Portsmouth" (p. 400).

Again, the court held the grant void because "the inquisition did not make proper returns to the commission, in that no return is made to that part of the commission in the inquisition whether any prejudice or damage will result to any person or persons, and whether the obtaining of the aforesaid lands from overflowing and surrounding with the sea are of great advantage and profit to the several parts of the county, and in that it transgresses directly the commission in granting a part of the *port* of Portsmouth," (p. 405).

Again, the court of exchequer bases its judgment upon the lapse of time in which nothing was done under the grant, saying that "the distance between 1628 and 1784 is not what

the Crown expected when it contemplated that there should be an undertaking and attempt at recovering the land, but that it should be a reasonable time to recover the land from the sea" (p. 407).

And the court of exchequer again held that a grant made, of which no advantage had been taken, and never had been acted upon for a *century and a half*, had lapsed and the presumption was of surrender; so "where we find the King, by his subjects, still in possession of this soil for the passing and repassing of such vessels, we must conclude that if it ever existed in force this grant had been in the interim surrendered to the Crown."

And the court further held "that the King could not grant such creeks and ports, including the greatest *port* in the Kingdom and one of the most important."

This case went up to the House of Lords, and is quoted in pages 412 to 464, 10*th Price, In re Portsmouth Harbor*.

At page 454, on the question of reclamation and possession under the grant by embankment, and thus excluding the waters of the sea, Lord Redesdale said: "I apprehend there is a *part of the land in possession* under these letters patent. It is what extends from the passage near the town of Lymington near the bridge. Now that is to my knowledge *embanked* and I believe has been for a vast number of years; that *is in possession, I believe, under the grant.*"

And the discussion of the question of possession and prescription under the grant as it had been made in the court below was part of the discussion in the House of Lords. The House of Lords, in delivering the judgment, by Lord Chancellor, said, page 463:

Eldon, Lord Chancellor: "My lords, I shall not break in upon your lordships' usage by offering any reason for the affirmance of this judgment, but I am anxious to say this and this only, that, as I conceive, *where there has been a pos-*

session for sixty years under this grant, nobody can be removed, so I desire not to be understood to imply one way or the other what may be the effect of these letters patent with respect to any one part of the land which this instrument covers, except the soil on which these buildings are erected."

It thus appears from this case that the House of Lords does not state on what particular ground they affirm the judgment, whether the grant was originally good or whether the grant, if originally good, by lapse of time was presumed to be surrendered to the Crown, or whether the grant was a part of the *harbor* of Portsmouth, none of which reasons or grounds appear in the case above; but what is of importance in the case is the decision of the House of Lords that "where there has been a *possession for sixty years under this grant, nobody can be removed.*"

In other words, independent of any questions that might be made as to the grant and its validity, when once the grantee had *embanked*, and thus reclaimed, as Lord Redesdale remarked, had been the case of a part of the land within the boundaries of the grant, and had been in possession sixty years, his right, title, interest, and possession was beyond even the question of the Crown.

The facts of this case as to location of the land are widely different from facts in case at bar, which are not part of a port or harbor; but applying the principles of this case to the case at bar on the point of prescription, the position of the claimants in this cause is beyond all attack, for the court below found as a matter of fact in the Lynah case that by the muniments of title it appeared that the land was enclosed and in a state of culture 120 years ago and probably longer; that the nature of the enclosure was an *embankment* protecting the rice plantation from the river, and that it had been in actual continued use for

seventy years and upwards as a rice plantation. Findings of fact 4 and 6, p. 7, Transcript of Record, Lynah case.

And in the Williams case, the court finds at page 13 of the transcript of record as follows:

"The facts in relation to the said finding being in all respects the same as in the said case of *Lynah vs. The United States*, as set out at length in the opinion of the court therein, dated 25th of January, 1900, and for the reasons therein stated It has been for *over a century* protected from the river or any invasion of tidal water by an *embankment* and cultivated in rice, and was so cultivated by the plaintiffs since their ownership of the said plantation in 1876, up to the time of the abandonment thereof" (p. 13).

So that if the rights of the claimants are to be measured by that case and by the rights in the British Crown, to whom the State at the close of the Revolutionary war was successor, and the rights of the United States depend upon the right surrendered by the State, these claimants, in the language of Lord Eldon, after sixty years' possession cannot be removed; they cannot be ousted of possession, as is found in the court below, without compensation.

All this is independent of what we have already shown in this argument, that by the law of the State of South Carolina, looking to its own grants, statutes, and decisions, the limit of *private ownership*, if covered by the grant, goes down absolutely to low-water mark, and that such is the law after reclamation as recognized by this court in decided cases.

J. P. K. BRYAN,
Counsel for Defendants in Error,
Arthur Lynah et al., in No. 45.
JULIAN MITCHELL, JR.,
Counsel for Defendants in Error,
Chas. A. Williams et al., in No. 59.

FILE COPY

Supreme Court of the United States

OCTOBER TERM, 1945

No. 44.

THE UNITED STATES, Petitioner, vs.

against

ARTHUR LYNAH ET AL., Defendants et Petitioners.

No. 52.

THE UNITED STATES, Petitioner, vs.

against

CHARLES A. WILLIAMS AND ADELIA [illegible]
Defendants et Petitioners.

[illegible]

Supreme Court of the United States

OCTOBER TERM, 1902.

No. 45.

THE UNITED STATES, PLAINTIFF IN ERROR,

against

ARTHUR LYNAH ET AL., DEFENDANTS IN ERROR.

No. 59.

THE UNITED STATES, PLAINTIFF IN ERROR,

against

CHARLES A. WILLIAMS AND AMELIA S. WILLIAMS,
DEFENDANTS IN ERROR.

WRIT OF ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA.

SUPPLEMENTAL BRIEF OF DEFENDANTS IN ERROR.

AUTHORITIES THAT THE SERVITUDE OR EASEMENT CLAIMED BY THE GOVERNMENT MUST BE SPECIALLY PLEADED AND CANNOT BE SET UP HERE FOR FIRST TIME IN THIS COURT.

In our main briefs (Lynah case, p. 44; Williams case, p. 36) we took the position that the answer of the United States,

defendant in these cases, did not assert any title in themselves, did not set up any easement or servitude (see answer, p. 6; transcript of Williams case, p. —), and that therefore such easement or servitude, which is an affirmative defense, could not be availed of as a defense. Moreover, that it does not appear from the record that such easement or servitude was made the subject of a request, as a conclusion of law, to the court below, and the ninth assignment of error raises the question for the first time in this court on the ground that the court below only failed to hold such easement, but it does not appear that the court below was ever requested so to hold. In this state of the record the question cannot be made here.

"An *excuse* of the trespass and a *justification* in respect of any *easement* or incorporeal right, a right of way either *public* or private, and whether by grant, prescription, custom or necessity, must always be *specially pleaded*."

1 Chitty on Pl., p. 541.

"This was an action for trespass; the defendants offered in excuse of the trespass, which had been proved, evidence of the existence and occupation by themselves of a private way in the *locus in quo* for twenty years, etc. The court said: 'But whether the evidence offered would have been a good defense or not, we are all of the opinion that the defendants could not avail themselves of it, under the general issue, in this case, * * * and had no right to give evidence of such an easement, unless specially pleaded.'

Trout vs. Berry, 7 Mass., p. 385.

"It often occurs that one undertakes to justify acts which would otherwise be unlawful, as injuriously affecting another's possession, on the ground that he had a right to do so under and by virtue of a right of easement. And where to an action for such injury the defendant justifies in his plea, great particularity and precision are required in stat-

ing, for instance, the right of way under which defendant alleges a right to enter upon the close of the plaintiff."

Washburn's Easements and Servitudes, ch. VI, § 2, p. 16.

"The right to an easement as a defense to an action must be pleaded specially, and cannot be taken advantage of under the general issue."

Vol. III, Ency. of Pl. & Pr., p. 258.

"It seems to be an established rule of pleading that wherever the defendant in trespass *clausum fregit* justifies the trespass by reason of some title or easement, which gives him a legal right to do the act complained of, he must set forth his title or right to enjoy the easement especially, so that the plaintiff may have an opportunity of traversing it."

Pearle vs. Bridges, 2 Saund., 402, note 1.

"If defendant claims an easement, he must plead it specially, and cannot give it in evidence on the general issue."

Com. Dig. Pleader, sec. 15; *Hawkins vs. Wallis*, 2 Wils., 173.

"So an entry by authority of law without process, such as * * * or to abate a nuisance to a water-course, must be specially pleaded."

Chitty on Pleading, p. 541.

"A justification of the trespass in respect of any claim by custom, etc., to any way or other easement, or to any water-course, or to the use of any water, must be pleaded."

Same, p. 541.

Waters vs. Lilley, 4 Pick., 145.

"This was an action of trespass *quære clausum fregit*. The defendant offered evidence of a license from the plaintiff.

The evidence was objected to on the ground that a license must be specially pleaded and could not be given under the general issue. Objection was overruled, and verdict for defendant. Upon appeal the court said:

"In the case of *Bennett vs. Alcot* Mr. Justice Buller says: 'It is now perfectly clear that a license to enter cannot be given in evidence under the general issue, and if the law is perfectly clear we are under no obligation to give reason for it. The reason is obvious, however:

"'It is that the plaintiff shall not be surprised by a defense of which he had no notice and of which he could not be apprised by defendant's plea.'

"New trial granted."

Gambling vs. Prince, 2 Nott & McC. (So. Car.), 138.

It is clear, therefore, that having gone to trial on a question of title only, defendant cannot in appellate jurisdiction set up easement as a defense.

Again, in the *Pumpelly case* the defense of easement was specially pleaded in a distinct affirmative plea.

13 Wall., pp. 170, 171.

And in *Hill vs. United States*, 149 U. S., 593, "the United "States positively and precisely pleaded as to the land below "*low water* in Chesapeake bay, and that under the law, for "the purpose of a light-house, it has a paramount right to "its use as against plaintiff or any other person."

But in this case at bar there is no affirmative plea and no claim of title or easement in the United States in the answer.

And now, in this court, for the first time, is there any claim of an easement, and that only in an *undefined part* of this rice plantation, not pleaded as a defense.

It is a general rule that questions not made on the trial

or presented to the court below for decision cannot be entertained here.

Union Pac. R. R. *vs.* Myers, 115 U. S., 1.
Lloyd *vs.* Preston, 146 U. S., 630.
Montana R. Co. *vs.* Warren, 137 U. S., 348.

DIFFERENCE BETWEEN TIDAL AND NAVIGABLE WATERS.

The continuous fallacy and misapprehension running through the argument of counsel for the Government and all his briefs in this case is the failure to distinguish between tidal and navigable waters in South Carolina. We have previously shown in our briefs that the rule in South Carolina is to grant salt marsh lands, which are lands covered on high tide once a day by tidal but not *navigable* waters; that tide swamp was granted, and the most valuable land in the history of the State; that the limit of private ownership, if the grant so extends, is to low-water mark, and that the trust in the State for navigation is in the channel, or "beds proper," of navigable streams which are not grantable, of course, to settlers under the land acts.

This principle and distinction is clearly enforced by the supreme court of South Carolina in the recent case of *Heyward vs. Farmers' Co.*, 42 So. Ca., 156–'7:

"If the plaintiff can trace the title back to a grant from the State to land covered by *tidal* though not *navigable waters*, the State would be estopped by its grant. The principle, however, is different when the land granted is covered by *navigable* waters, as shown by Mr. Justice McGowan in *State vs. Pacific Guano Co.*"

Now, *the portion* of this rice plantation that the court below finds is between mean high water and low water was never covered by *navigable* waters, but only by *tidal* waters; it was therefore never the subject of a trust for navigation.

This appears by the pleading, the complaint alleging the rice plantation, 420 acres, was *reclaimed*, as delineated by red lines on map annexed (fol. 3, p. 2, Transcript Lynah case). The map annexed, at page 12, is dated 1772, and the Savannah Back river is outside the red lines, within which is the rice plantation.

Again, by the original official survey and plat attached to original grant of Vernezobre plantation to Daniel Vernezobre in 1736, which shows the primal condition of the *locus in quo*, the Savannah Back river as a *navigable* stream is outside the limits of the property granted. (By comparison the plats of 1736 and 1772 are identical in this respect.) And the lines on both sides of the plantation on the plat annexed to the grant down to the Savannah Back river show the trees which mark the courses in that primal state of these premises to be bay, gum, and water oak on one side, and water oak, hickory, oak, and live oak on the other side, up to the navigable channel of the Savannah Back river, as shown on original map and survey, showing that down to the river in the primal state of nature a heavy timbered swamp originally extended, and these rice fields are the reclaimed swamp forest.

To say that in this swamp forest there was and is a trust for navigation in the sovereign because a part of it was below the ordinary high water and made it *tide* swamp—*i. e.*, covered by *tidal* water, but not by *navigable* water—is to ignore the leading principle in the law of the State of South Carolina, for it was on this principle her chief agriculture was founded and rice became her first staple. As the court below found: "The whole rice culture of South Carolina is founded on this system and the *policy* of the colony and the State has been to grant such lands for rice culture" (page 7, finding VI).

The policy of this original grant was for and on condition of settling, for building houses, for clearing for reclamation, for keeping herds of cattle, and it was "*in free and common*

socage," the most liberal of the English tenures, and it was for *valuable consideration* on a rent reserved. Moreover, it was certain in description, courses, distances, and area, and with plat and survey accurately located the navigable Savannah Back river that was the boundary now and then in the plat.

On such a grant and plat and survey this rice plantation was reclaimed, established at great cost and expense, as is obvious in order to reduce a swamp forest to the systematic and scientific culture of rice fields; and it was in pursuance of a governmental *policy*, in the first step of colonization and development of agriculture in the colony in the leading staple, rice, that this rice plantation was reclaimed and established; and so founded and the right vested, it is beyond the prerogative of government to destroy it or dispossess without compensation.

This court has just said:

"The status of real estate within a particular jurisdiction is not so much one of contract as of *policy*, which may be changed at any time by the legislature *provided no vested rights are disturbed*. Of course if riparian proprietors have acquired the title to the property below high-water mark by a grant or prior possession good against the State they could only be dispossessed by proceedings in eminent domain."

Mobile Trans. Co. *vs.* City of Mobile, Oct. term, 1902; decided 5 Jan., 1902.

The *policy* of the State of South Carolina and the Crown and colony for one hundred and seventy years and more has been to grant these lands for rice culture, and the whole history and development of the agriculture of that colony shows this system of rice culture to be her chief and richest agriculture, and the grant of such rice lands in part covered by *tidal* but not *navigable* waters, by the latest utterance of the supreme court of South Carolina, estops the State, and in the latest utterance of this court the plaintiffs "*could only be dispossessed by proceedings in eminent domain.*"

JURISDICTION.

I.

The cause of action below is alleged as follows:

"That your petitioners have a claim against the United States of America under an *implied contract* for compensation for the value of property taken by the United States for public use, as hereinafter stated and alleged."

Paragraph 2, Pet., p. 2, fol. 3.

The fourth paragraph of complaint alleges that "the "Government of the United States, in the exercise of its "power of eminent domain under the Constitution of the "United States and by authority of the acts of Congress duly "empowering its officers and agents thereto, &c., did erect "the dams, &c., in Savannah river."

After alleging the permanent destruction of the lands by the superinduced addition of water actually invading the rice plantation, in paragraph 6 of complaint, the seventh allegation is:

"That the said acts of the United States have been done "and are being done *lawfully* by the officers and agents of "the United States under the authority of the United States "in the exercise of its powers of eminent domain and regu-"lation of commerce under the Constitution of the United "States" * * * "for the public use, purpose and ben-"efit of commerce."

The eighth paragraph of complaint alleges "there is due and owing unto plaintiffs by the United States for the * * * *taking* by the United States of the said four hundred and twenty acres, as aforesaid, of the said plantation,

for public uses and purposes, $10,000.00, the value of and lawful compensation for such property so taken."

The court below said:

"The object of the proceeding is to obtain just compensation for certain lands alleged to have been taken by the Government for public purposes. The cause of action is on the *implied contract* arising from such alleged taking to give just compensation therefor under the fifth amendment" (p. 6, fol. 14).

It appears, therefore, that the complaint below was in express terms an action on an *implied contract;* and was "founded on the Constitution of the United States," and for both of these reasons was a cause of action within the jurisdiction of the court below. It appears, moreover, that the court below held that "the cause of action is on an implied contract."

There is no error assigned in this record against the opinion of the court below that "the cause of action is on an implied contract."

There is no question made in the assignments of error that the court below erred in holding that this cause of action is on an implied contract, and the decision of the court below that the facts alleged constituted an implied contract cannot, therefore, be reviewed here.

The act conferring jurisdiction is as follows:

"First. All claims founded upon the *Constitution* of the United States or any law of Congress, except for pensions, *or* upon any regulation of an executive department, or upon any contract, expressed or implied, with the Government of the United States, *or* for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the

United States either in a court of law, equity, or admiralty if the United States were suable."

Vol. 24, Revised Stat. U. S., page 505 (March 3, 1887).

"SEC. 2. Circuit court has concurrent jurisdiction in all cases where claim exceeds $1,000 and does not exceed $10,000."

II.

If the question were an original question here, the conclusion would be this is a suit on an implied contract, founded on the fifth amendment of the Constitution.

In this case the plaintiffs allege that the erection of the dam and the said acts of the Government of the United States, as aforesaid, have been done and are being done *lawfully* by the officers and agents of the United States *under the authority of the United States* in the exercise of its powers of *eminent domain* and *regulation of commerce* under the Constitution of the United States and the laws of Congress for the improvement of Savannah river for the public benefit of commerce, see paragraph 7, page 6, Transcript Lynah case.

And the seventh finding of the court below in the Lynah case was: "For several years last past and at the present time the Government of the United States, under its proper officers, *authorized thereto by act of Congress*, have been engaged in the improvement of the navigation of the Savannah river, a navigable water of the United States, this improvement being carried on by virtue of the provisions of section 8, article I, of the Constitution, giving to Congress the power to regulate commerce."

Finding eighth. "In thus improving the navigation of this navigable water *the United States has built and maintained* and is now building and maintaining the dams, training walls, and other obstructions which have caused the Savannah river to flow back, and have resulted in the destruction

of the plantations and the actual and practical ouster of plaintiffs' possession."

Finding eleventh of fact: "The court further finds that the backing up of the water and the invasion of these lands by the superinduced addition of water *was rendered necessary by the execution of the Government's plans.*"

It was such permanent flooding that this court said in Mugler *vs.* Kansas, 123 U. S., 668, "that his property was in effect required to be devoted to the use of the public."

The court below also said in the fifth conclusion of law, Lynah case: "The Government does not in a sense take this land for the purpose of putting its obstructions on it, but it forces back the water of the river on the land as a result necessary to its purpose, without which its purpose could not be accomplished," and in finding seventh of law the court again says:

"The Government has not gone into actual occupancy of this land, but by reason of these dams and obstructions made necessary by this public work and fulfilling its purpose, the water in the Savannah river has been raised at the plaintiff's plantation and remains on it."

In *93 U. S., 4, 13, 14,* this court said of these improvements of the Savannah river, which at that time were begun as a policy of the Government:

"The mode of improving the harbor was left to the discretion of the Secretary of War, and the mode adopted under his supervision constantly tends to the improvement contemplated."

The following acts of Congress appropriate money "to "be expended under the direction of the Secretary of War "for the construction, etc., of public works," and, among others named, improvement of the harbor of Savannah:

24th vol. Stat., pp. 310, 313.

Continuing improvement of harbor of Savannah, $150,000.
25th vol. Stat., pp. 400, 404; 1889.
26th vol. Stat., pp. 426, 431; 1890.
27th vol. Stat., p. 603, 1893; $1,000,000.
28th vol. Stat., p. 341; 1894.
29th vol. Stat., pp. 202, 208; 1895.
30th vol. Stat., p. 44, $1,000,000, 1897.

This action was brought in 1897.

In all these appropriations the matter was remitted to the *discretion* of the Secretary of War to determine the plan and method of improvements.

By act April 24, 1888, 25 vol. Stat., p. 94—*an act to facilitate the prosecution of works projected for the improvement of rivers and harbors*—the Secretary of War is authorized to proceed by condemnation to acquire "any land or right of "way needed to enable him to maintain, operate, or pros-"ecute work for the improvement of rivers and harbors, "for which provision has been made by law," or to purchase same.

This act shows that the Congress of the United States in these improvements did not mean to override the Constitution and fifth amendment and take arbitrarily, but provided for condemnation and payment for any lands needed.

This was the exact relation of the Secretary of War, with a power of condemnation in the improvement, to the parties in case of 112 U. S., Great Falls Manufacturing Company, in which this court say that, without waiting for such formal condemnation proceedings, the claimants could waive same and come into the Court of Claims for compensation.

By reference to the river and harbor act in these successive years, it will be found that the appropriations for the improvement of the harbor of Savannah, above which this plantation is situated, were continuously and successively committed to the discretion of the Secretary of War, so that it appears by the actual findings of the court below that all of

these acts done, whereby this plantation has been taken within the constitutional meaning of the word taken in the fifth amendment, have been done *directly by the Government of the United States, under the authority of acts of Congress vesting a discretion in the Secretary of War*, and therefore that these acts whereby this plantation was taken were the authorized acts of government necessary to accomplish its purpose, and were in no sense the unauthorized acts of public officers, and in no sense a tort. It was the Government itself, through its highest representative, acting as it alone could act to accomplish a declared statutory purpose under the discretion of the Secretary of War. It is in fact and in law the act of the sovereign, and in so acting the sovereign, as an incident to the power under which it acts, proceeds under the limitation of the fifth amendment, which implies the obligation to pay for what it has lawfully taken in the exercise of its supreme power.

III.

IMPLIED CONTRACT ON THE PART OF THE GOVERNMENT TO PAY COMPENSATION WHERE THE GOVERNMENT TAKES PRIVATE PROPERTY.

This court has always held since the Pumpelly case, in 15th Wall., "that the backing of water so as to overflow the "lands of an individual, or any other superinduced addition "of water, *if done under statutes authorizing it for the public* "*benefit*, is such a taking as by the constitutional provision "*demands compensation*."

Pumpelly vs. The Green Bay Company, 13 Wall., 166, rubric 6.

In the Pumpelly case this court cites with approval the language of the New Jersey supreme court, as follows:

"That this power to take private property reaches back of all constitutional provisions and it seems to have been a

settled principle of universal law that the *right to compensation* is an *incident* of the exercise of that power; that the one is inseparably connected with the other; that they may be said to exist, not as separate and distinct principles, but as *one and the same principle.*"

13 Wall., pp. 178–'9.

In *Mugler vs. Kansas*, 123 U. S., 667, 668, this court said of the Pumpelly case as follows:

"It was a case in which a *permanent flooding* of private property, a physical invasion of the real estate of the private owner and a practical ouster of his possession. *His property was in effect required to be devoted to the use of the public*, and consequently he *was entitled to compensation.*"

In Scranton *vs.* Wheeler, 179 U. S., 153, 154, this court said:

"Undoubtedly *compensation must be made* or secured to the owner when that which is done is to be regarded as a taking of private property for public use within the meaning of the 5th amendment of the Constitution and of course in its exercise of power to regulate commerce, Congress may not override the provision that *just compensation must be made* when private property is taken for public use."

In The United States *vs.* Jones, 100 U. S., 513, this court says:

"The liability to make compensation for private property taken for public uses is a constitutional limitation of the right of eminent domain."

In Kaukauna Water Power Company *vs.* The Green Bay and Mississippi Canal Company, 142 U. S., 254–'5, this court said:

"So far as land is *actually taken* for the purpose of this improvement, either for the dam itself or for the embankment, *or for the overflow*, or so far as water was diverted from its natural course or from the uses to which the riparian owner would otherwise have been entitled to devote it, such owner is *undoubtedly entitled to compensation*" (p. 276).

"The only authority by which private property could be taken or overflowed was one derived from the State or General Government; whatever appropriation was made or injury done to such lands was done solely for the *benefit of the public and it was right the public should pay the compensation therefor*" (p. 278).

"Question of compensation is one separate and apart from the transfers of which this property was subject, but one which *in honor as well as in law was chargeable upon the public.*"

In United States *vs.* Monongahela Company, 148 U. S., 312, this court said:

"But, like other powers granted to Congress by the Constitution, the power to limit commerce is subject to all the limitations imposed by such instrument, and among them is that of the fifth amendment. Congress has supreme control over the regulation of commerce, but if in exercising that supreme control it deems it necessary to *take private property*, then it must proceed subject to the limitation imposed by this fifth amendment *and can take only on payment of just compensation.*"

And in the same case this court again said of the franchise of the company destroyed by the Government:

"The franchise is a vested right. The State has power to grant it, as it may take other private property for public uses *upon the payment of just compensation.* A like, though a superior, power exists in the National Government. It may

take it for public purposes, and take it even against the will of the State, but it can no more take the franchise which the State has given than it can any private property belonging to an individual" (p. 341, *idem*).

"The Government takes it away from the company, whatever use it may make of it, and the question of just compensation is not determined by the value to the Government which takes, but the value to the individual from whom the property is taken" (p. 343, *idem*).

In this case the value of these rice lands to the Government for holding the overflow, above dams, as a necessary means of accomplishing its purpose of improving the harbor of Savannah, and without which lands it could not accomplish its purpose, is of incalculable riches, for by it as a means it has vastly increased the commerce of the port of Savannah, and already added millions to its customs and over a hundred millions annually to the trade of that port, as the statistics show. It is not a case of pure destruction save to the owner. Flooded for public use, it serves a vaster and more lucrative public end and purpose than it ever did as private property.

In *United States vs. Great Falls Mfg. Co.*, 112 U. S., this court say:

"By *what authority have they appropriated to public use the property of the claimant?* The answer to this question will determine whether the present demand of the claimant arises out of an *implied contract*, and therefore *enforceable by suit against* the United States in the Court of Claims.

"It seems clear that these property rights have been held and used by the agents of the United States, under the *sanction of legislative enactments by Congress;* for the appropriation of money specifically for the construction of the dam from the Maryland shore to Conn's island was, all the circumstances considered, equivalent to an express direction by the legislative and executive branches

of the Government to its officers to take this particular property for the public objects contemplated by the scheme for supplying the capital of the nation with wholesome water. The *making of the improvements necessarily involves the taking of the property; and* if, for the want of formal proceedings *for its condemnation to public use*, the claimant was entitled, at the beginning of the work, to have the agents of the Government enjoined from prosecuting it until provision was made for securing in some way, payment of the compensation required by the Constitution—upon which question we express no opinion—there is no sound reason why the *claimant might not waive that right, and, electing to regard the action of the Government as a taking under its sovereign right of eminent domain, demand just compensation* (Kohl *vs.* United States, 91 U. S., 367, 374). In that view, we are of *opinion that the United States, having by its agents, proceeding under the authority of an act of Congress,* taken the property of the claimant for public use, are *under an obligation, imposed by the Constitution, to make compensation. The law will imply a promise to make the required compensation, where property, to which the Government asserts no title,* is taken, pursuant to an act of Congress, as private property to be applied for public uses. Such an implication being consistent with the constitutional duty of the Government, as well as with common justice, the claimant's cause of action is one that arises out of *implied contract*, within the meaning of the statute which confers jurisdiction upon the Court of Claims of actions founded 'upon any contract, express or implied, with the Government of the United States.'

"Having abandoned the proceedings of condemnations, the proper officers of the Government, in conformity with the acts of Congress, constructed the dam from the Maryland shore to Conn's island, *the doing of which necessarily involved the occupation and use of the property* as contemplated in what was called the fourth plan for bringing water from the

Great Falls to Washington and Georgetown. In such a case it is difficult to perceive why the legal obligation of the United States to pay for what was thus *taken pursuant to an act of Congress* is not quite as strong as it would have been had formal proceedings for condemnation been resorted to for that purpose. If the claimant makes no objection to the particular mode in which the property has been taken, but substantially waives it *by asserting as is done in the petition in this case, that the Government took the property for the public uses designated,* we do not perceive that the court is under any duty to make the objection in order to relieve the United States from the obligation to make just compensation.

"In reference to the title which the Government will acquire as the result of this suit, there would seem to be no difficulty. The finding of the court is that the claimant exhibited to the arbitrators a valid title to the lands in question. It does not appear that the company has ever parted with that title; and the finding is that no title except that of the claimant is asserted."

United States vs. Great Falls Mfg. Co., 112 U. S., 645–659.

In this record it appears that in their answer the Government of the United States never asserted title in these lands in themselves, but simply put plaintiffs on proof of their title, which the court below finds to be absolute fee-simple in plaintiffs in the lands in question. (See answer, p. 5, Lynah case.) Again it appears by the petition and complaint that the plaintiffs assert that the Government took the property for the public uses assigned" (paragraph 7, complaint, p. 3, Lynah case). Again the court below finds as fact that the "taking" of these lands by backing up of the water was "rendered necessary by the execution of the Government's plans" (fol. 18, p. 8, Transcript Lynah case.)

Every element therefore appears in this case which appeared in the Great Falls Mfg. Co. case, in which the judgment was against the United States.

In Great Falls Mfg. Co. case, 124 U. S., the court say:

"Much stress seems to be laid upon the allegation in the bill—which the appellant insists must be taken as true—that the Secretary of War, by his servants and agents, took possession of lands of the plaintiff, which are 'not within any description made, surveyed, or traced' by him, and has used the same for the purpose of constructing the proposed dam across Conn's island and to the Virginia shore. As the act of Congress provided that the Secretary of War, upon the publication by the Attorney General of the required notice, 'may take possession of the premises embraced in the survey and map,' it is contended that his possession of the company's land and water rights is without authority of law, and constitutes a mere *trespass;* in which case, it is argued, the United States are not legally bound to make compensation to the plaintiff." * * * "So that if the Secretary of War, who was invested with large discretion in determining what land was actually required to accomplish in the best manner the object Congress had in view, found it necessary to take, and has taken and used, and still holds lands of the plaintiff for the proposed dam, which happen not to be covered by the survey and map, the United States are as much bound to make just compensation therefor as if such lands had been actually embraced in that survey and map.

"Of course, we are not to be understood as saying that the Secretary of War could, by any act of his, bind the United States to pay for lands taken by him which, manifestly, had no substantial connection with the construction of the dam across Conn's island to the Virginia shore. It is sufficient to say that the record discloses nothing showing that he has taken more land than was reasonably necessary for the purposes described in the act of Congress, or that he did not

honestly and reasonably exercise the *discretion* with which he was invested; and, consequently, the Government is under a constitutional obligation to make compensation for any property or property-right taken, used, and held by him for the purposes indicated in the act of Congress, whether *it is embraced or described in said survey or map*, or not (*United States vs. Great Falls Manufacturing Co.*, 112 U. S., 645, 656)."

"In reference to the allegation that the survey and map made by the Secretary were not sufficiently accurate, and that the notice published by the Attorney General was materially defective, it may be further said that all such objections were waived by the company when, proceeding under the act of 1882, it invoked the jurisdiction of the Court of Claims to give judgment against the United States for such compensation as it was entitled to receive for its land and water rights. Even if the Secretary's survey and map, and the publication of the Attorney General's notice did not, *in strict law, justify the former in taking possession of the land and water rights* in question, *it was competent for the company to waive the tort, and proceed against the United States*, as upon an *implied contract*, it appearing, as it does here, that the Government recognizes and retains the possession taken in its behalf for the public purposes indicated in the act under which its officers have proceeded."

Great Falls Man. Co. vs. Att'y Gen., 124 U. S.

The record here shows and the court below finds as a fact that this flooding is permanent, and the land so taken and "required to be devoted to the public use" for holding the waters backed up is necessary to the execution of the Government plan, and the United States still continues to use and proposes to permanently use it for such purpose, and this is for the great public benefit and enrichment of the commerce of the country.

Again this court say :

"The right of eminent domain always was a right at "common law."

Kohl vs. 91 *U. S.*, 376.

"The right of eminent domain was one of those means "well known when the Constitution was adopted, and em- "ployed to obtain lands for public uses." * * * "The "fifth amendment contains a provision that private prop- "erty shall not be taken for public use without just com- "pensation. What is that but an *implied assertion* that *on* "*making just compensation*, it may be taken."

Idem, 373.

And, when so taken, the bill of rights in this fifth amendment, which "is a covenant between the Government and every citizen whose property is appropriated by it for public use" (155 U. S. 177), implies that the Government will pay the compensation, which is the only way the Government of the United States can take private property without overriding the Constitution.

The obligation that the law imposes raises an implied contract.

In *Steamship Co. vs. Joliffe*, 2 Wall., 450, 457 :

Where a pilot tendered his service under compulsory pilotage which was declined and sued on implied contract this court said: "The transaction in this latter case between the pilot and the master or owners cannot be strictly termed a contract, but it is a transaction to which the law attaches similar consequences; it is a *quasi* contract. The absence of assent on the part of the master or owner of the vessel does not change the case. In that *large class* of transactions designated in the law as *implied contracts* the assent or convention which is an essential ingredient of an actual contract is often wanting. Thus, if a party

obtain the money of another by mistake it is his duty to refund it, not from any agreement on his part, but from the general obligation to do justice which rests on all persons. In such case the party makes no promise on the subject, but the law 'consulting the interests of morality' implies one, and the liability then arising is said to be a liability upon an implied contract" (citing 16 Cal., 282; Maine, Ancient Law).

Of contracts, Parsons says:

"Far more frequently they are not expressed at all, and for their definition and extent we must look to the common principles, which all are supposed to understand and acknowledge. In this sense *contract* is co-ordinate and commensurate with *duty;* and it is a familiar principle of the law, of which we shall have much to say hereafter, and which has a wide, though far from universal application, that whatsoever it is certain a man ought to do, that the law supposes him to have promised to do."

"Implied contracts," says Blackstone (vol. II. p. 443) "are "such as reason and justice dictate, and which, therefore, "the law presumes that every man undertakes to perform."

Parsons on Contracts, vol. I, p. 5.

"Contracts implied in law are legal fictions adopted for the purpose of enforcing legal duties by actions *ex contractu*, where no actual contract exists, either express or implied. In the case of a contract implied in law, the *intention* is disregarded."

Vol. 15, p. 1078, Eng. and Am. Ency. of Law, and cases cited.

"Wherever the defendant has converted the property of the owner to his own use, the owner may either disaffirm his act and treat him as a wrong-doer or sue for trespass, etc., or affirm his acts and sue in assumpsit."

Cooley on Torts, p. 109.

"In the English law the above terms ('*quasi* contracts') do not occur; there the obligation is said to arise out of a contract or promise *which the law implies*."

2d vol. Austin, Jurisprudence, 5th ed., p. 912.

In the case at bar the law—the highest law—the Constitution itself, in the fifth amendment, implies the contract or promise to pay for private property taken for public use.

That it has been established as a principle in the English law that "*indebitatus assumpsit* lies where the duty is to pay money," see vol. 2, Harvard Law Review, "*The History of Assumpsit*," pp. 64, 65, 66.

There can be no higher duty, no more binding principle of public morality and national honor, than the charter compact of the Government with its citizen in the fifth amendment in protection of his private property to pay money therefor as compensation when taken for a public use. This is always an *implied contract*, for which assumpsit lies.

The case at bar is to be distinguished from the cases where the United States has been sued in tort for *unauthorized* acts of its officers.

"But it is not to be disguised that this case is an attempt, under the assumption of an implied contract, to make the Government responsible for the *unauthorized acts* of its officers, these acts being in themselves torts. No government has ever held itself liable to individuals for the *misfeasance*, laches, or *unauthorized* exercise of power by its officers and agents."

Gillam vs. U. S., 8 Wall., 274.

Again:

"The general principle which we have already stated as applicable to all governments forbids, on a policy imposed by necessity, that they should hold themselves liable for *unauthorized wrongs* inflicted by their officers on the citizens

though occurring while engaged in the discharge of official duty."

Langford *vs.* U. S., 101 U. S., 346.

The distinction between *authorized* acts of those officers, acting under lawful authority and doing acts which imply contracts, and the *unauthorized* acts of officials as torts is put by this court very clearly:

"While Congress might be willing to subject the Govern-
"ment to the judicial enforcement of valid contracts, which
"could only be valid as against the United States when made
"by some officer of the Government acting under lawful au-
"thority, with power vested in him to make such contracts,
"or to *do acts which implied them*, the very essence of a tort
"is that it is an *unlawful act*, done in violation of the legal
"rights of some one."

Langford vs. United States, 101 U. S., 345.

Again:

"That this action is one sounding in tort is clear. It is in form one to recover *damages*. The petition charges a *wrongful* appropriation by the Government, against the protest of the claimants, and prays to recover the *damages* done by such *wrong*. * * * If it be said that a party may sometimes waive a tort and sue in assumpsit, as on an implied promise, it is technically a sufficient reply that these claimants have not done so. They have not counted on any promise, either express or implied. But we do not care to rest our decision upon the mere form of action. The transaction, as stated in the petition and as disclosed by the findings of the court, was a tort, pure and simple.'

Schillinger vs. U. S., 155 U. S., 169.

"Congress has wisely reserved to itself the right to give or withhold relief where the claim is founded on the *wrongful* proceedings of an officer of the Government."

Id., p. 168.

If this were a tort we could waive the tort and sue on implied contract. In contradistinction from these cases of tort, however, the petition of the plaintiffs alleges, the findings of fact by the court below establish, and the acts of Congress cited authorizing these improvements show, that the Government itself, in and by the discretion confided in the Secretary of War, having under the statutes also a power to acquire any needed land by condemnation proceedings and purchase and in and by authorized officers carrying out the plans of the Government in its exercise of the power to regulate commerce, and under the power of eminent domain, took these lands in which they asserted no title, by permanent flooding, rendered necessary in the execution of the Government plan, and without which the statutory and declared purpose of the Government could not be accomplished. This taking by the Government itself, lawfully proceeding in the exercise of supreme power under the Constitution to regulate commerce, implies the promise, raised by the fifth amendment, within the decided limitation of its power to regulate commerce, that it will pay just compensation for the private property it has itself taken.

J. P. K. BRYAN,
Counsel for Lynah et al. in No. 45,

JULIAN MITCHELL, JR.,
Counsel for Williams et al. in No. 59,
Defendants in Error.

Supreme Court of the United States.

No. 45.—October Term, 1902.

The United States, Plaintiff in Error, vs. Arthur Lynah et al. } In error to the Circuit Court of the United States for the District of South Carolina.

[~~January~~ February 26, 1903.]

On February 4, 1897, defendants in error commenced their action in the Circuit Court of the United States for the District of South Carolina to recover of the United States the sum of $10,000 as compensation for certain real estate (being a part of a plantation known as Verzenobre) taken and appropriated by the defendant.

The petition alleged in the first paragraph the citizenship and residence of the petitioners; in the second, that they had a claim against the United States under an implied contract for compensation for the value of property taken by the United States for public use; third, that they were the owners as tenants in common of the plantation; and in the fourth and seventh paragraphs:

"Fourth. That for several years continuously, and now continuously, the said Government of the United States of America, in the exercise of its power of eminent domain under the Constitution of the United States and by authority of the acts of Congress, duly empowering its officers and agents thereto, in that case made and provided, did erect, build and maintain, and continuously since have been erecting, building and maintaining, and are now building, erecting and maintaining in and across the said Savannah River, in the bed of the said Savannah River, certain dams, training walls and other obstructions, obstructing and hindering the natural flow of the said Savannah River through, in and along the natural bed thereof and raising the said Savannah River feet at the point of and above the said obstructions and dams in the bed of the said Savannah River, and causing the said waters of the Savannah River aforesaid to be kept back and to flow back and to be raised and elevated above the natural height of the Savannah River along its natural bed at the points of the said dams, training walls and obstructions, and at points above the said dams, training walls and obstructions in said river."

"Seventh. And your petitioners further show that the said acts of the Government of the United States, as aforesaid, have been done and are being done lawfully by the officers and agents of the United States under the authority of the United States in the exercise of its powers of eminent domain and regulation of commerce under the Constitution of the United States and the laws of Congress for the public purpose of the improvement of the harbor of Savannah and deepening the waters of the Savannah River at the port of Savannah, a port of entry of the United States

and seaport of the United States of America, situated within the State of Georgia, on the Savannah River, and with the purpose of deepening and enlarging the navigable channel and highway for commerce of the said Savannah River for the public use, purpose and benefit of interstate and foreign and international trade and commerce, and for other public purposes, uses and benefits."

The remaining paragraphs set forth the effect of the placing by the government of the dams, restraining walls and other obstructions in the river, together with the value of the property appropriated by the overflow. The answer of the government averred:

"First. That this defendant has no knowledge or information sufficient to form a belief as to the truth of the allegations contained in the first and third paragraphs of the said petition and complaint.

"Second. That this defendant denies all of the allegations contained in the second, fourth, fifth, sixth, seventh and eighth paragraphs of the said petition and complaint except so much of the fourth paragraph as alleges that the said United States heretofore erected certain dams in the Savannah River pursuant to power vested in it by law, and except so much of the seventh paragraph as alleges that the said dams heretofore erected by the United States were lawfully erected by its officers and agents."

For a further defense the statute of limitations was pleaded. The case came on for trial before the court without a jury, which made findings of fact, and from them deduced conclusions of law and entered a judgment against the defendant for the sum of $10,000. The findings were to the effect that the plaintiffs were the owners of the plantation, deriving title by proper mesne conveyances from "a grant by the lord's proprietors of South Carolina," made in 1736. Other findings pertinent to the questions which must be considered in deciding this case were as follows:

"IV. A certain parcel of these plantations, measuring about 420 acres, had been reclaimed by drainage and had been in actual continued use for seventy years and upwards as a rice plantation, used solely for this purpose. This rice plantation was dependent for its irrigation upon the waters of the Savannah River and its ditches, drains and canals, through and by which the waters of the river were flowed in and upon the lands, and were then drained therefrom, were adapted to the natural level of the said Savannah River, and dependent for their proper drainage and cultivation upon the maintenance of the natural flow of the said river in, through and over its natural channel along its natural bed to the waters of the ocean.

"V. This portion of the plantation fronting on the river and dedicated to the culture of rice, extended almost up to if not quite to low-water mark, and a large part of it was between mean high-water and low-water mark, protected from the river by an embankment. Through this embankment trunks or waterways were constructed, with flood gates therein. The outer opening of the trunk was about a foot or a little less above the mean low-water mark of the river, in which the tide ebbs and flows. When it is desired to flow the lands the flood gates are opened and the water comes in. When it is desired to draw off this water and to effect the drainage of the lands, the flood gates are opened at low water and the water escapes.

It is essential that the outlets of the trunks or waterways should always be above the mean low-water mark.

* * * * * *

"VII. For several years last past and at the present time the government of the United States, under its proper officers, authorized thereto by the act of Congress, have been engaged in the improvement of the navigation of the Savannah River, a navigable water of the United States, this improvement being carried on by virtue of the provisions of section 8, article I, of the Constitution, giving to the Congress the power to regulate commerce.

"VIII. In thus improving navigation of this navigable water the United States has built and maintained and is now building and maintaining in and across the Savannah River, in the bed thereof, certain dams, training walls and other obstructions, obstructing the natural flow of said river in and along its natural bed, and so raising the level of said river above said obstructions, and causing its waters to be kept back and to flow back and to be elevated above its natural height in its natural bed.

"IX. This rice plantation Verzenobre is above these obstructions. The direct effect thereof is to raise the level of the Savannah River at this plantation, and to keep the point of mean low water above its natural point, so that the outlet of the trunks and waterways above spoken of in the bank of said plantation, instead of being above this point of low-water mark, is now below this point. Another direct result was that by seepage and percolation the water rose in the plantation until the water level in the land gradually rose to the height of the increased water level in the river, and the superinduced addition of water in the plantation was about eighteen inches thereby. By reason of this it gradually became difficult, and has now become impossible, to let off the water on this plantation or to drain the same, so that these acres dedicated to the culture of rice have become boggy, unfit for cultivation and impossible to be cultivated in rice.

"X. By the raising of the level of the Savannah River by these dams and obstructions the water thereof has been backed up against the embankment on the river and has been caused to flow back upon and in this plantation above the obstruction, and has actually invaded said plantation, directly raising the water in said plantation about eighteen inches, which it is impossible to remove from said plantation. This flooding is the permanent condition now, and the rice plantation is thereby practically destroyed for the purpose of rice cnlture or any other known agriculture, and is an irreclaimable bog and has no value.

"XI. By reason of this superinduced addition of water actually invading the said rice plantation and its destruction thereby for all purposes of agriculture, plaintiffs have been compelled to abandon the cultivation of said rice plantation and have been forced to pursue their calling of planting rice on other plantations below the dams. The direct result to plaintiffs is an actual and practical ouster of possession from this rice plantation, cultivated by themselves and family for many years.

"XII. Beyond the backing up of the water on and in the plantation by reason of the dams and obstruction, and the invasion of these lands by this superinduced addition of water at and in the plantation as above described, rendered necessary by the execution of the government's plans, the United States is not in actual possession of these lands.

"XIII. Up to this time no other use has been discovered for these lands than for rice culture, and the direct results above stated have totally destroyed the market value of the lands. They now have no value.

"XIV. The value of these rice lands before the obstructions aforesaid were put into the river was about thirty dollars per acre, between twenty-five and thirty dollars per acre. The value of the rice plantation, 420 acres, thus destroyed is ten thousand dollars."

Upon these findings of fact the important conclusions of law were thus stated:

"V. The crucial question in this case is, Was there a taking of this land in the sense of the Constitution?

"The facts found show that by reason of the obstruction in the Savannah River the water has been directly backed up against the embankment on the river and the banks on and in this plantation, the superinduced addition of water actually invading it and destroying its drainage and leaving it useless for all practical purposes. The government does not in a sense take this land for the purposes of putting its obstructions on it. But it forces back the water of the river on the land as a result necessary to its purpose, without which its purpose could not be accomplished. For the purpose of the government, that water in the river must be raised. The banks of this plantation materially assists this operation, for by their resistance the water is kept in the channel. The backing up of the water against the banks to create this resistance raises the water in the plantation and destroyes the drainage of the plantation. This is a taking. 'It would,' says Mr. Justice Miller, 'be a very curious and unsatisfactory result if, in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which had received the commendation of jurists, statesmen and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public, it can destroy its value entirely, can inflict irreparable and permanent injury to any extent; can, in effect, subject to total destruction without making any compensation, because in the narrowest sense of that word it has not been taken for the public use.' (*Pumpelly* v. *Green Bay Co.*, 13 Wall. 177, 178.) In that case the backing up of water on land was held to be a taking.

"VI. The plantation of plaintiffs being actually invaded by superinduced addition of water directly caused by the government dams and obstructions backing up the water of the Savannah River and raising the water level at and in the rice plantation and making it unfit for rice cultivation or for any other known agriculture, and plaintiffs having been compelled thereby to abandon the plantation, and this actual and practical ouster of possession being continued and permanent by reason of the permanent condition of the flooding of the plantation, and the plantation being thereby now an irreclaimable bog of no value, makes the action of the government a taking of lands for public purposes within the meaning of the Fifth Amendment, for which compensation is due to the plaintiffs. (*Pumpelly* v. *Green Bay Co.*, 13 Wall. 182; *Mugler* v. *Kansas*, 123 U. S. 668.)

"VII. The government has not gone into actual occupancy of this land, but by reason of these dams and obstructions made necessary by this public work and fulfilling its purpose the water in the Savannah River has been raised at the plaintiffs' plantation and has been backed up on it and remains on it so that the drainage has been destroyed and ditches filled up and superadded water permanently kept on the land and forced up into it, making it wholly unfit for cultivation, and the plaintiffs have thereby been practically and actually ousted of their possession. This is taking of the land for public purposes, for which compensation must be provided. (*Pumpelly* v. *Green Bay Co.*, 13 Wall. 181."

The case involving the application of the Constitution of the United States was brought by writ of error directly to this court.

Mr. Justice BREWER delivered the opinion of the Court.

There are three principal questions in this case: First, did the Circuit Court have jurisdiction; second, was there a taking of the land within the meaning of the Fifth Amendment; and, third, if there was a taking, was the government subject to the obligation of making compensation therefor?

Did the Circuit Court have jurisdiction? It may be premised that this question was not raised in the Circuit Court, nor was it presented to this court on the first argument but only upon the reargument. This omission on the part of the learned counsel for the government is certainly suggestive. Nevertheless as the question, now for the first time presented, is one of jurisdiction it must be considered and determined. To sustain the challenge of jurisdiction it is insisted by the government that there was no implied contract, but simply tortious acts on the part of its officers, and *Hill* v. *United States*, (149 U. S. 593,) and *Schillinger* v. *United States*, (155 U. S. 163.) are relied upon. Let us see what those cases were and what they decided. In the former the plaintiff sued to recover from the United States for the use and occupation of land for a lighthouse. The land upon which the lighthouse was built was submerged land in Chesapeake Bay. The government pleaded that it had a paramount right to the use of the land, and that plea was demurred to. It was held that the Circuit Court had no jurisdiction, and in the opinion delivered by Mr. Justice Gray it was said, after referring to several cases (pp. 598–9):

"In *Langford* v. *United States*, it was accordingly adjudged that, when an officer of the United States took and held possession of land of a private citizen, under a claim that it belonged to the government, the United States could not be charged upon an implied obligation to pay for its use and occupation

"It has since been held that if the United States appropriates to a public use land which they admit to be private property, they may be held, as upon an implied contract, to pay its value to the owner. (*United States* v. *Great Falls Manufacturing Company*, 112 U. S. 645, and 124 U. S. 581.) It has likewise been held that the United States may be sued in the Court

of Claims for the use of a patent for an invention, the plaintiff's right in which they have acknowledged. (*Hollister* v. *Benedict Manufacturing Company*, 113 U. S. 59; *United States* v. *Palmer*, 128 U. S. 262.) But in each of these cases the title of the plaintiff was admitted, and in none of them was any doubt thrown upon the correctness of the decision in Langford's case. See *Schillinger* v. *United States*, (24 C. Cl. 278.)

"The case at bar is governed by Langford's case. It was not alleged in this petition, nor admitted in the plea, that the United States had ever in any way acknowledged any right of property in the plaintiff as against the United States. The plaintiff asserted a title in the land in question, with the exclusive right of building thereon, and claimed damages of the United States for the use and occupation of the land for a lighthouse. The United States positively and precisely pleaded that the land was submerged under the waters of Chesapeake Bay, one of the navigable waters of the United States, and that the United States, 'under the law, for the purpose of a lighthouse, has a paramount right to its use as against the plaintiff or any other person;' and the plaintiff demurred to this plea."

In the other case it appeared that the architect of the Capitol contracted with G. W. Cook for the laying of pavement in the Capitol grounds. The contractor in laying the pavement infringed, as petitioners claimed, upon rights granted to them by patent. Thereafter this suit was brought, not against the party guilty of the alleged infringement, but against the United States which had accepted the pavement in the construction of which, as petitioners claimed, the contractor had infringed upon their rights. In the opinion it was said (p. 170):

"Here the claimants never authorized the use of the patent right by the government; never consented to, but always protested against it, threatening to interfere by injunction or other proceedings to restrain such use. There was no act of Congress in terms directing, or even by implication suggesting, the use of the patent. No officer of the government directed its use, and the contract which was executed by Cook did not name or describe it. There was no recognition by the government or any of its officers of the fact that in the construction of the pavement there was any use of the patent, or that any appropriation was being made of claimant's property. The government proceeded as though it were acting only in the management of its own property and the exercise of its own rights, and without any trespass upon the rights of the claimants. There was no point in the whole transaction from its commencement to its close where the minds of the parties met or where there was any thing in the semblance of an agreement. So not only does the petition count upon a tort, but also the findings show a tort. That is the essential fact underlying the transaction and upon which rests every pretence of a right to recover. There was no suggestion of a waiver of the tort or a pretence of any implied contract until after the decision of the Court of Claims that it had no jurisdiction over an action to recover for the tort."

How different is the case at bar! The government did not deny the title of the plaintiffs. It averred in the answer simply that it had "no knowledge or information sufficient to form a belief," but did not couple

such averment with any denial, nor did it pretend that it owned the property or had a paramount proprietary right to its possession. It did not put in issue the question of title, but rested upon a denial that the acts its officers had done by its direction had overflowed the land and wrought the injury as alleged, or that such overflow and injury created an implied contract, and also upon the bar of the statute of limitations. Nowhere in the record did it set up any title to the property antagonistic to that claimed by the plaintiffs. It simply denied responsibility for what it had caused to be done, and pleaded that if it had ever been liable, the statute of limitations had worked a bar. No officer of the government, as in the Langford case, claimed that the property found by the court to be the property of the plaintiffs, belonged to the government. While there was no formal admission of record that the land belonged to the plaintiffs, the case was tried alone upon the theory that the government could not be held responsible for what it had done. It did not repudiate the actions of its officers and agents, but on the contrary in terms admitted that they acted by authority of Congress, and that all that they did was lawfully done. So that if the overflow and destruction of this property was, as we shall presently inquire, a taking and appropriation within the scope of the Fifth Amendment to the Constitution, the jurisdictional question now presented is whether such appropriation directed by Congress created an implied contract on the part of the government to pay for the value of the property so appropriated. Let us see what this court has decided. In *United States* v. *Great Falls Manufacturing Company*, (112 U. S. 645,) Congress having made an appropriation therefor, a dam was constructed across the Potomac with the view of supplying the city of Washington with water. In the construction of such dam certain lands belonging to the plaintiff were taken, although such lands were not by the act of Congress specifically ordered to be taken. The property so taken not having been paid for, plaintiff brought this action in the Court of Claims to recover the value thereof, and it was held that the action might be maintained, and in the opinion it was said (p. 656):

"It seems clear that these property rights have been held and used by the agents of the United States, under the sanction of legislative enactments by Congress; for the appropriation of money specifically for the construction of the dam from the Maryland shore to Conn's Island was, all the circumstances considered, equivalent to an express direction by the legislative and executive branches of the government to its officers to take this particular property for the public objects contemplated by the scheme for supplying the capital of the nation with wholesome water. The making of the improvements necessarily involves the taking of the property; and if, for the want of formal proceedings for its condemnation to public use, the claimant was entitled, at the beginning of the work, to have the agents of the government enjoined from prosecuting it until provision was made for securing, in some way, payment of the compensation required by

the Constitution—upon which question we express no opinion—there is no sound reason why the claimant might not waive that right, and, electing to regard the action of the government as a taking under its sovereign right of eminent domain, demand just compensation. (*Kohl* v. *United States*, 91 U. S. 367, 374.) In that view we are of opinion that the United States, having by its agents, proceeding under the authority of an act of Congress, taken the property of the claimant for public use, are under an obligation, imposed by the Constitution, to make compensation. The law will imply a promise to make the required compensation, where property to which the government asserts no title, is taken, pursuant to an act of Congress, as private property to be applied for public uses. Such an implication being consistent with the constitutional duty of the government, as well as with common justice, the claimant's cause of action is one that arises out of implied contract, within the meaning of the statute which confers jurisdiction upon the Court of Claims of actions founded 'upon any contract, express or implied, with the government of the United States.'"

In *Great Falls Manufacturing Company* v. *The Attorney General*, (124 U. S. 581,) an action, which, like the preceding, grew out of provisions made by Congress to supply water to the city of Washington, and in which the relief sought was the removal of all structures on the premises, or if it should appear that the property had been legally condemned, the framing of an issue, triable by jury, to ascertain the plaintiff's damages, and a judgment for the amount thereof, it was said, referring to the contention that there were certain defects in the proceedings taken by the government (p. 597):

"Even if the Secretary's survey and map, and the publication of the Attorney General's notice did not, in strict law, justify the former in taking possession of the land and water rights in question, it was competent for the company to waive the tort, and proceed against the United States, as upon an implied contract, it appearing, as it does here, that the government recognizes and retains the possession taken in its behalf for the public purposes indicated in the act under which its officers have proceeded."

In *Hollister* v. *Benedict Manufacturing Company*, (113 U. S. 59,) an action by the assignees of a patent against a United States collector for infringement, the law is thus stated (p. 67):

"If the right of the patentee was acknowledged, and, without his consent, an officer of the government, acting under legislative authority, made use of the invention in the discharge of his official duties, it would seem to be a clear case of the exercise of the right of eminent domain, upon which the law would imply a promise of compensation, an action on which would lie, within the jurisdiction of the Court of Claims, such as was entertained and sanctioned in the case of *The United States* v. *The Great Falls Manufacturing Company*, (112 U. S. 645.)"

In *United States* v. *Palmer*, (128 U. S. 262,) an action in the Court of Claims by a patentee against the government to recover upon an implied contract for the use of the patented invention, it appeared that the

petitioner was the patentee of certain improvements in infantry equipments which were adopted by the Secretary of War as a part of the equipment of the infantry soldiers of the United States, and, sustaining the jurisdiction of the Court of Claims, it was said (p. 269):

"No tort was committed or claimed to have been committed. The government used the claimant's improvements with his consent; and, certainly, with the expectation on his part of receiving a reasonable compensation for the license. This is not a claim for an infringement, but a claim of compensation for an authorized use—two things totally distinct in the law, as distinct as trespass on lands is from use and occupation under a lease."

In *United States* v. *Berdan Fire-Arms Company*, (156 U. S. 552,) a judgment of the Court of Claims against the United States on an implied contract for the use of an improvement in breechloading firearms was sustained, although there was no act of Congress expressly directing the use of such improvement. In the opinion it was said (p. 567):

"While the findings are not so specific and emphatic as to the assent of the government to the terms of any contract, yet we think they are sufficient. There was certainly no denial of the patentee's rights to the invention; no assertion on the part of the government that the patent was wrongfully issued, no claim of a right to use the invention regardless of the patent; no disregard of all claims of the patentee, and no use, in spite of protest or remonstrance. Negatively, at least, the findings are clear. The government used the invention with the consent and express permission of the owner, and it did not, while so using it, repudiate the title of such owner."

And then, after quoting from several of the findings, it was added (p. 569):

"The import of these findings is this: That the officers of the government, charged specially with the duty of superintending the manufacture of muskets, regarded Berdan as the inventor of this extractor ejector; that the difference between the spiral and flat spring was an immaterial difference; that, therefore, they were using in the Springfield musket Berdan's invention; that they used it with his permission as well as that of his assignee, the petitioner, and that they used it with the understanding that the government would pay for such use as for other private property which it might take, and this, although they did not believe themselves to have the authority to agree upon the price."

The rule deducible from these cases is that when the government appropriates property which it does not claim as its own it does so under an implied contract that it will pay the value of the property it so appropriates. It is earnestly contended in argument that the government had a right to appropriate this property. This may be conceded, but there is a vast difference between a proprietary and a governmental right. When the government owns property, or claims to own it, it deals with it as owner and by virtue of its ownership, and if an officer of the government

takes possession of property under the claim that it belongs to the government (when in fact it does not) that may well be considered a tortious act on his part, for there can be no implication of an intent on the part of the government to pay for that which it claims to own. Very different from this proprietary right of the government in respect to property which it owns is its governmental right to appropriate the property of individuals. All private property is held subject to the necessities of government. The right of eminent domain underlies all such rights of property. The government may take personal or real property whenever its necessities or the exigencies of the occasion demand. So the contention that the government had a paramount right to appropriate this property may be conceded, but the Constitution in the Fifth Amendment guarantees that when this governmental right of appropriation—this asserted paramount right—is exercised it shall be attended by compensation.

The government may take real estate for a post office, a court house, a fortification or a highway; or in time of war it may take merchant vessels and make them part of its naval force. But can this be done without an obligation to pay for the value of that which is so taken and appropriated? Whenever in the exercise of its governmental rights it takes property, the ownership of which it concedes to be in an individual, it impliedly promises to pay therefor. Such is the import of the cases cited as well as of many others.

The action which was taken, resulting in the overflow and injury to these plaintiffs, is not to be regarded as the personal act of the officers but as the act of the government. That which the officers did is admitted by the answer to have been done by authority of the government, and although there may have been no specific act of Congress directing the appropriation of this property of the plaintiffs, yet if that which the officers of the government did, acting under its direction, resulted in an appropriation it is to be treated as the act of the government. (*South Carolina* v. *Georgia*, 93 U. S. 4, 13; *Wisconsin* v. *Duluth*, 96 U. S. 379; *United States* v. *Great Falls Manufacturing Company, supra.*)

Congress for many successive terms appropriated money for the improvement of the Savannah River. (21 Stat. 470, 480; 22 Stat. 194, 200; 23 Stat. 140; 24 Stat. 321, 331; 25 Stat. 413; 26 Stat. 442; 27 Stat. 101; 28 Stat. 351.) These appropriations were in the river and harbor bills, and were generally of so much money for improving the river, but some deserve special mention. Thus, in 21 Stat. 470 it was provided that "one thousand dollars may be applied to payment of damages for land taken for widening the channel opposite Savannah." In 24 Stat. 331, the Secretary of War was directed to cause a survey to be made of the "Savannah River from cross tides above Savannah to the bar, with a view to obtaining twenty-eight feet of water in the channel." The appropria-

tion in the 25 Stat. 413 was for the improvement of the river, "completing the present project and commencing the extended project contained in the report of Engineer for year ending June 30, 1887." And by the same statute, 431, among the matters referred to the Secretary of War for survey and examination was "whether the damage to the Verzenobre freshet bank in 1887 was caused by the work at cross tides, and whether the maintenance of said bank is essential to the success of the work at cross tides, and what will be the cost of so constructing said bank as to confine the water of said river to its bed." The report of the engineers for the year 1887, referred to in the section above quoted, shows that part of the work which was being done by the government was in the construction of training walls, and wing dams, by which the width of the waterway was reduced.

Further, the same year (25 Stat. 94) an act was passed, entitled "An Act to Facilitate the Prosecution of Works Projected for the Improvement of Rivers and Harbors," which authorized the Secretary of War to commence proceedings "for the acquirement by condemnation of any land, right of way, or material needed to enable him to maintain, operate or prosecute works for the improvement of rivers and harbors for which provision has been made by law; . . . provided, however, that when the owner of such land, right of way, or material shall fix a price for the same, which in the opinion of the Secretary of War, shall be reasonable, he may purchase the same at such price without further delay."

Thus, beyond the effect of the admission in the answer, and beyond the presumption of knowledge which attends the action of all legislative bodies, it affirmatively appears not only that Congress was making appropriations from year to year for the improvement of the river, but also that it had express notice of damage to the banks along this very plantation; that the works which were being done by the engineers had in view the narrowing of the width of the waterway; that land would be damaged as the result of those works, and that it authorized the Secretary of War to take proceedings in eminent domain to acquire the land, right of way and material which might be necessary for maintaining, operating or prosecuting works of river improvement, or, if the price could be agreed upon, to purchase the same.

This brings the case directly within the scope of the decision in *United States* v. *Great Falls Manufacturing Company, supra*, where, as here, there was no direction to take the particular property, but a direction to do that which resulted in a taking, and it was held that the owner might waive the right to insist on condemnation proceedings and sue to recover the value.

It does not appear that the plaintiffs took any action to stop the work done by the government, or protested against it. Their inaction and silence amount to an acquiescence—an assent to the appropriation by

the government. In this respect the case is not dissimilar to that of a landowner who, knowing that a railroad company has entered upon his land and is engaged in constructing its road without having complied with the statute in respect to condemnation, is estopped from thereafter maintaining either trespass or ejectment, but is limited to a recovery of compensation. (*Roberts* v. *Northern Pacific Railroad*, 158 U. S. 1, 11; *Northern Pacific Railroad* v. *Smith*, 171 U. S. 260, and cases cited in the opinion.)

The case, therefore, amounts to this: The plaintiffs alleged that they were the owners of certain real estate bordering on the Savannah River; that the government, in the exercise of its powers of eminent domain and regulation of commerce, through officers and agents duly empowered thereto by acts of Congress, placed dams, training walls and other obstructions in the river in such manner as to hinder its natural flow and to raise its waters so as to overflow the land of plaintiffs, and overflow it to such an extent as to cause a total destruction of its value. The government, not denying the ownership of plaintiffs, admitted that the work which was done by their officers and agents was done by authority of Congress, but denied that those works had produced the alleged injury and destruction. We are of opinion that under these pleadings and the issues raised thereby the Circuit Court had jurisdiction to inquire whether the acts done by the officers of the United States under the direction of Congress had resulted in such an overflow and injury of the plaintiff's land as to render it absolutely valueless, and if thereby the property was, in contemplation of law, taken and appropriated by the government, to render judgment against it for the value of the property so taken and appropriated.

Was there a taking? There was no proceeding in condemnation instituted by the government, no attempt in terms to take and appropriate the title. There was no adjudication that the fee had passed from the landowner to the government, and if either of these be an essential element in the taking of lands, within the scope of the Fifth Amendment, there was no taking.

Some question is made as to the meaning of the findings. It appears from the fifth finding, as amended, that a large portion of the land flooded was in its natural condition between high-water mark and low-water mark, and was subject to overflow as the water passed from one stage to the other; that this natural overflow was stopped by an embankment, and in lieu thereof, by means of flood gates, the land was flooded and drained at the will of the owner. From this it is contended that the only result of the raising of the level of the river by the government works was to take away the possibility of drainage. But findings nine and ten show that, both by seepage and percolation through the embankment, and an actual flowing upon the plantation above the obstruction, the water has been raised in the plantation about eighteen inches, that it is impossible to

remove this overflow of water, and, as a consequence, the property has become an irreclaimable bog, unfit for the purpose of rice culture or any other known agriculture, and deprived of all value. It is clear from these findings that what was a valuable rice plantation has been permanently flooded, wholly destroyed in value, and turned into an irreclaimable bog; and this as the necessary result of the work which the government has undertaken. Does this amount to a taking? The case of *Pumpelly* v. *Green Bay Company*, (13 Wall. 166,) answers this question in the affirmative. And on the argument it was conceded by the learned counsel for the government (and properly conceded in view of the findings) that so far as respects the mere matter of overflow and injury there was no substantial distinction between the two cases. In that case the Green Bay Company, as authorized by statute, constructed a dam across Fox River, by means of which the land of Pumpelly was overflowed and rendered practically useless to him. There, as here, no proceedings had been taken to formally condemn the land. Referring to this it was said (p. 177):

"The argument of the defendant is that there is no *taking* of the land within the meaning of the constitutional provision, and that the damage is a consequential result of such use of a navigable stream as the government had a right to for the improvement of its navigation."

"It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public, it can destroy its value entirely, can inflict irreparable and permanent injury to any extent; can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not *taken* for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority for invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors."

Reference was also made to the case of *Sinnickson* v. *Johnson*, 2 Harr. (N. J.) 129, in respect to which it was said: "The case is mainly valuable here as showing that overflowing land by backing the water on it was 'considered' as taking it within the meaning of the principle." Again, on page 179, it was said: "But there are numerous authorities to sustain the doctrine that a serious interruption to the common and necessary use of property may be, in the language of Mr. Angell, in his work on Water Courses, equivalent to the taking of it, and that under the constitutional provisions it is not necessary that the land should be absolutely taken."

And in a foot-note the following authorities were cited: Angell on Water Courses, sec. 465*a*; *Hooker* v. *New Haven & Northampton Co.*, (14 Conn. 146;) *Rowe* v. *Granite Bridge Co.*, (21 Pick. 344;) *Canal Appraisers* v. *The People*, (17 Wend. 604;) *Lackland* v. *North Missouri Railroad Co.*, (31 Mo. 180;) *Stevens* v. *Proprietors of Middlesex Canal*, (12 Mass. 466.)

It is clear from these authorities that where the government by the construction of a dam or other public works so floods lands belonging to an individual as to substantially destroy their value there is a taking within the scope of the Fifth Amendment. While the government does not directly proceed to appropriate the title, yet it takes away the use and value; when that is done it is of little consequence in whom the fee may be vested. Of course, it results from this that the proceeding must be regarded as an actual appropriation of the land, including the possession, the right of possession and the fee; and when the amount awarded as compensation is paid the title, the fee, with whatever rights may attach thereto—in this case those at least which belong to a riparian proprietor—pass to the government and it becomes henceforth the full owner.

Passing to the third question, it is contended that what was done by the government was done in improving the navigability of a navigable river, that it is given by the Constitution full control over such improvements, and that if in doing any work therefor injury results to riparian proprietors or others it is an injury which is purely consequential, and for which the government is not liable. But if any one proposition can be considered as settled by the decisions of this court it is that, although in the discharge of its duties the government may appropriate property, it cannot do so without being liable to the obligation cast by the Fifth Amendment of paying just compensation.

In *Monongahela Navigation Company* v. *United States*, (148 U. S. 312, 336,) it was said:

"But like the other powers granted to Congress by the Constitution, the the power to regulate commerce is subject to all the limitations imposed by such instrument, and among them is that of the Fifth Amendment we have heretofore quoted. Congress has supreme control over the regulation of commerce, but if in exercising that supreme control it deems it necessary to take private property, then it must proceed subject to the limitation imposed by this Fifth Amendment, and can take only on payment of just compensation."

In that case Congress had passed an act for condemning what was known as "the upper lock and dam of the Monongahela Navigation Company," and provided "that in estimating the sum to be paid by the United States the franchise of said corporation to collect tolls should not be considered or estimated," but we held that this proviso was beyond the power of Congress; that it could not appropriate the property of the navigation com-

pany without paying its full value, and that a part of that value consisted in the franchise to take tolls. So in the recent case of *Scranton* v. *Wheeler*, (179 U. S. 141, 153,) we repeated the proposition in these words:

"Undoubtedly compensation must be made or secured to the owner when that which is done is to be regarded as a taking of private property for public use within the meaning of the Fifth Amendment of the Constitution, and, of course, in its exercise of the power to regulate commerce, Congress may not override the provision that just compensation must be made when private property is taken for public use."

It is true that a majority of the court held, in that case, that the destruction of access to land abutting on a navigable river by the construction by Congress of a pier on the submerged lands in front of the upland, was not a taking of private property for public uses, but only an instance of consequential injury to the property of the riparian owner. But the right of compensation in case of a taking was conceded. There have been many cases in which a distinction has been drawn between the taking of property for public uses and a consequential injury to such property, by reason of some public work. In the one class the law implies a contract, a promise to pay for the property taken, which, if the taking was by the general government, will uphold an action in the Court of Claims; while in the other class there is simply a tortious act doing injury, over which the Court of Claims has no jurisdiction. Thus, in *Transportation Company* v. *Chicago*, (99 U. S. 635,) the city, duly authorized by statute, constructed a tunnel along the line of LaSalle street and under the Chicago River. The company claimed that it was deprived of access to its premises by and during the construction. This deprivation was not permanent, but continued only during the time necessary to complete the tunnel, and it was held that there was no taking of the property, but only an injury, and that a temporary injury thereto. In the course of the opinion, after referring to the *Pumpelly case*, *supra*, and *Eaton* v. *Boston, Concord & Montreal Railroad Company*, (55 N. H. 104,) we said (p. 642):

"In those cases, it was held that permanent flooding of private property may be regarded as a 'taking.' In those cases there was physical invasion of real estate of the private owner, and a practical ouster of his possession. But in the present case, there was no such invasion. No entry was made upon the plaintiff's lot. All that was done was to render for a time its use more inconvenient."

Chicago v. *Taylor*, (125 U. S. 161,) while recognizing and reaffirming the rule there laid down, was decided upon the ground that a new rule was established by the Illinois constitution of 1870, which provided that "private property shall not be taken or damaged for public use without just compensation." *Montana Company* v. *St. Louis Mining &c. Company*,

(152 U. S. 160,) held that a mere order for inspection of mining property was not a taking thereof, because all that was done was a temporary and limited interruption of the exclusive use. *Gibson* v. *United States*, (166 U. S. 269,) decided that, where by the construction of a dyke by the United States in the improvement of the Ohio River the plaintiff, a riparian owner, was through the greater part of the gardening season deprived of the use of her landing for the shipment of products from and supplies to her farm, whereby the value of her farm was reduced $150 to $200 per acre, there was no taking of the property, but only a consequential injury. See also *Marchant* v. *Pennsylvania Railroad*, (153 U. S. 380;) *Meyer* v. *Richmond*, (172 U. S. 82.) In this connection *Mills* v. *United States*, (46 Fed. Rep. 738,) decided in the District Court for the Southern District of Georgia, is worthy of notice by reason of its similarity in many respects and its clearly marked distinction in an essential matter. It was an action for injuries to a rice plantation on the banks of the Savannah River resulting from works done by the United States in improving the navigability of that river, apparently the very improvement made by the government in the present case. The condition of the claimant's rice plantation prior to the improvement was substantially that of these plaintiffs' property, and the lands were drained by opening the gates when the river was at low-water mark. The complaint was that the erection by the government of what was called the "cross-tides dam," running from the upper end of Hutchinson's Island to the lower end of Argyle Island, cut off all the flow of water from the stream connecting the front and back rivers, raised both the high and low-water levels in the front river, and not only destroyed the facilities for draining these lands into the front river, but rendered it necessary to raise the levees around the rice fields, to prevent flooding the fields at high water. This, it was alleged, unfitted the lands for rice culture and made it necessary that new drainage into back river be provided where the water levels were suitable. Obviously, there was no taking of the plaintiff's lands, but simply an injury which could be remedied at an expense as alleged of $10,000, and the action was one to recover the amount of this consequential injury. The court rightfully held that it could not be sustained. Here there is no finding, no suggestion, that by any expense the flooding could be averted. We may, of course, know that there is theoretically no limit to that which engineering skill may accomplish. We know that vast tracts have in different parts of the world been reclaimed by levees and other works, and so we may believe that this flooding may be prevented, that some day all these submerged lands may be reclaimed. But as a practical matter, and for the purposes of this case, we must under the findings regard the lands in controversy as irreclaimable and their value wholly and finally destroyed.

Therefore, following the settled law of this court, we hold that there has been a taking of the lands for public uses and that the government is under an implied contract to make just compensation therefor.

The judgment is

Affirmed.

United States
vs.
Charles A. Williams et al. } No. 59.

This case is in all substantial respects similar to the one just decided, and for the reasons given in the opinion therein the judgment is

Affirmed.

For the reasons stated in their dissenting opinion in the prior case, the CHIEF JUSTICE, Mr. Justice HARLAN and Mr. Justice WHITE dissent also in this case.

Mr. Justice MCKENNA took no part in the decision of these cases.

True copy.

Test:

Clerk Supreme Court, U. S.

Supreme Court of the United States.

No. 45—October Term, 1902.

The United States, Plaintiff in Error, vs. Arthur Lynah et al. } In error to the Circuit Court of the United States for the District of South Carolina.

[February 23, 1903.]

Mr. Justice Brown concurring.

I concur in the opinion of the court both with respect to its jurisdiction and the merits of the case, but I am unable to assent to the ground upon which our jurisdiction is rested. While I think the overflowing of the lands in controversy constitutes a taking within the meaning of the Fifth Amendment to the Constitution, I see no reason for holding that there was an implied contract to pay for them within the meaning of the Tucker act. The taking appears to me an ordinary case of trespass to real estate, containing no element whatever of contract. In such case there can be no waiver of the tort. (*Jones* v. *Hoar*, 5 Pick. 285; *Smith* v. *Hatch*, 46 N. H. 146.)

But I think our jurisdiction may be supported, irrespective of the question of contract or tort, under that clause of the Tucker act which vests the Court of Claims with jurisdiction of "all claims founded upon the Constitution of the United States or any law of Congress."

As we had occasion to remark in *Dooley* v. *United States*, (182 U. S. 222–224,) the first section of the Tucker act evidently contemplates four distinct classes of cases: (1) those founded upon the Constitution or any law of Congress, with an exception of pension cases; (2) cases founded upon a regulation of an Executive Department; (3) cases of contract, express or implied, with the government; (4) actions for damages, liquidated or unliquidated, in cases *not sounding in tort*. The words "not sounding in tort" are in terms referable only to the fourth class of cases.

In my view, claims founded upon the Constitution may be prosecuted in the Court of Claims, whether sounding in contract or in tort; and wherever the United States may take proceedings in eminent domain for the condemnation of lands for public use, the owner of such lands may seek relief in the Court of Claims if his lands be taken without such proceedings, whether such taking be tortious or by virtue of some contract, express or implied, to that effect. That the case under consideration is one of that class is made clear by the act of April 24, 1888, (25 Stat. 94,)

which enacts "that the Secretary of War may cause proceedings to be instituted, in the name of the United States, in any court having jurisdiction of such proceedings, for the acquirement by condemnation of any land, right of way, or material needed to enable him to maintain, operate or prosecute works for the improvement of rivers and harbors for which provision has been made by law; such proceedings to be prosecuted in accordance with the laws relating to suits for the condemnation of property of the States wherein the proceedings may be instituted."

I fully concur in the opinion of the court that "the government may take real estate for a post office, a court house, a fortification or highway, or in time of war it may take merchant vessels and make them part of its naval force," but this cannot be "done without an obligation to pay for the value of that which is so taken and appropriated." I am also of opinion that whenever in the exercise of its governmental rights it takes property, the ownership of which it concedes to be in an individual, it is bound to pay therefor, but I do not think that there is any distinction between cases where the government impliedly promises to pay by taking property with the assent of the owner, and those where it takes property forcibly and against the will of the owner. It does not seem reasonable to hold that, where the invasion of the owner's right to property is the greater, his remedy for the recovery of its value should be less, and that he should be compelled to resort to the tedious and unsatisfactory method of appealing to the bounty of Congress for relief.

Suppose, for instance, in time of war and under threat of invasion it seizes upon vessels without the consent of the owner and against his protest. There is certainly the same moral obligation to pay for them as if they had been appropriated with his consent, and I see no reason why an action for their value may not be maintained in the Court of Claims. Yet, as I understand the opinion of the court in this case, it holds indirectly, if not directly, that no such action would lie unless the property were taken with the consent of the owner and under an implied contract to pay for it. The consequences of recognizing such distinctions seem to me so serious that nothing short of clear language in the statute will justify it.

None such is even hinted at in *United States* v *Russell*, (13 Wall. 623,) one of the earliest cases, wherein the owner of three steamers seized under "imperative military necessity" sought to recover compensation for their services. These steamers were impressed into the public service and employed as transports for carrying government freight for a certain length of time, when they were returned to the owner. He was held entitled to recover, the court holding that "extraordinary and unforeseen occasions arise, however, beyond all doubt, in cases of extreme necessity, in time of war, or of immediate and impending public danger, in which private

property may be impressed into the public service, or may be seized and appropriated to the public use, or may be even destroyed without the consent of the owner." The case followed that of *Mitchell* v. *Harmony*, (13 How. 115,) and was distinguished from that of *Filor* v. *United States*, (9 Wall. 45.)

While the cases reported prior to 131 U. S. are based upon the original Court of Claims act, which limited the jurisdiction of that court to "claims founded upon any law of Congress, or upon any regulation of an Executive Department, or upon any contract, express or implied, with the government of the United States," and are therefore not strictly pertinent under the Tucker act, that of the *Great Falls Manufacturing Co.*, (112 U. S. 645,) is almost exactly in point, and is strongly corroborative of the position here taken. This was a claim for land taken at the Great Falls of the Potomac in the construction of an aqueduct for bringing water to Washington. Proceedings were taken in Maryland for condemnation, which were discontinued, and the government took possession of the land. Whether such possession was taken with or without the consent of the owner does not appear, although there had been negotiations between the parties. The claimant was held to be entitled to recover upon the ground that the appropriation of the money for the construction of the improvements was equivalent to an express direction by Congress to take this particular property for the objects contemplated by the scheme, and that there was no sound reason why the claimant might not waive any right he might have to an injunction, and elect to regard the action as a taking by the government under its sovereign right of eminent domain, and therefore demand compensation. The case was not put upon the ground that the owner had consented to the taking.

In *Langford's case*, (101 U. S. 341,) the action was brought to recover for the use and occupation of certain lands and buildings to which the claimant asserted title, which were seized for the use of the government under claim that they were public property. It was admitted that if the government takes property for public use, acknowledging its ownership to be private or individual, there arises an implied obligation to pay the owner its value; but that it was a different matter when the government claimed the property as its own and recognized no superior title. This was also the case in *Hill* v. *United States*, (149 U. S. 593,) where the government erected a lighthouse upon submerged land which it claimed as its own. The case was held to be governed by that of Langford.

None of the more recent cases under the Tucker act conflicts with the position here taken: That wherever the United States may proceed to condemn property under its sovereign right of eminent domain, the owner may maintain a petition in the Court of Claims to recover its value, in

case no such proceedings are taken. That act (24 Stat. 505) first introduced among the cognizable claims all such as were founded upon the Constitution of the United States, and also introduced, after the words "for damages, liquidated or unliquidated," the words "in cases not sounding in tort." Construing this statute, it was held in the *Jones case*, (131 U. S. 1,) that it did not confer jurisdiction in equity to compel the issue and delivery of a patent for public land; and in *Schillinger's case*, (155 U. S. 163,) that the owner of a patent which had been infringed by the United States could not recover damages for such infringement in the Court of Claims, though it would be otherwise if the property had been appropriated with the consent of the patentee and in view of compensation therefor. Although there was in Schillinger's case an appropriation of the right of a patentee to the monoply of his invention, the case was nothing more in its essence than the infringement of a patent, and so the action was really one for damages sounding in tort. While it is possible an individual might be able to condemn the patentee's right by proceedings in eminent domain, that remedy would be at least doubtful, when the government sought merely to appropriate so much of it as was necessary for its own use. It would be an unprecedented exercise of the right of eminent domain, and could scarcely be held to be a claim arising under the Constitution. The case was not put upon the ground that it was such a case, but that it was merely an action to recover damages for infringement. Said the court: "It was plainly and solely an action for infringement and one sounding in tort." The question whether it was a claim arising under the Constitution was not considered, except in the dissenting opinion of Mr. Justice Harlan, who said: "The constitutional obligation cannot be evaded by showing that the original appropriation was without the express direction of the government, nor by simply interposing a denial of the title of the claimant to the property, or property rights alleged to have been appropriated." If there were any doubt in that case of the power of the government to condemn the right of the patentee by proceedings in eminent domain, there is certainly none such in this case, where the land was taken by the government with no pretence of consent by the owner.

I think it is going too far to hold that the words of the Tucker act, "not sounding in tort," must be referred back to the first class of cases, namely, "those founded upon the Constitution," and that they should be limited to actions for damages, liquidated or unliquidated, and, hence, the consent of the owner cuts no figure in this case. I freely admit that, if property were seized or taken by officers of the government without authority of law, or subsequent ratification, by taking possession or occupying property for public use, there could be no recovery, since neither the government nor any other principal is bound by the unauthorized acts of its agents.

But in endeavoring to raise an implied contract to pay for an ordinary trespass to real estate I think the opinion of the court misconceives the true source of our jurisdiction.

Mr. Justice SHIRAS and Mr. Justice PECKHAM concurred in the above opinion in so far as it holds that the court had jurisdiction on the ground stated therein, as well as upon the ground stated in the opinion of the court.

True copy.

Test:

Clerk Supreme Court, U. S.

Supreme Court of the United States.

No. 45.—October Term, 1902.

The United States, Plaintiff in Error, vs. Arthur Lynah et al. } In error to the Circuit Court of the United States for the District of South Carolina.

[February 23, 1903.]

Mr. Justice White, with whom concurs Mr. Chief Justice Fuller and Mr. Justice Harlan, dissenting.

The court now holds that it has jurisdiction, because as a legal conclusion from the findings of fact it is held that the property of the appellee has been taken for public use by the United States, and the judgment below is affirmed on the merits for the same reason. As, in my opinion, the findings of fact do not support the conclusion that the property has been taken by the United States, I dissent both on the subject of jurisdiction and on the merits.

The findings of fact are in most respects sufficiently reproduced in the opinion of the court, and need not here be set out in full. It results from the findings that the land is situated on the Savannah River; that it is between high and low-water mark, and naturally subject to be overflowed, but that it is protected in some measure from overflow by an embankment, and that through this embankment sluices or waterways were placed, by means of which water was let in on the land for irrigation in the cultivation of rice, and was drawn off when the land was required to be drained in order to carry on the same culture. This was done by gates in the sluices, which were opened to allow the water to flow through the waterways to the inner side of the embankment and thus flood the land when it was requisite to do so, and by opening the gates at low tide to allow the water to flow off when it was required to drain the land. As the exact situation of the waterways through the embankment is important, I reproduce the statement on the subject contained in the findings:

"Through this embankment trunks or waterways were constructed, with flood gates therein. The outer opening of the trunk was about a foot or a little less above the mean low-water mark of the river, in which the tide ebbs and flows. When it is desired to flow the lands the flood gates are opened and the water comes in. When it is desired to draw off this water and to effect the drainage of the lands, the flood gates are opened at low water and the water escapes. It is essential that the outlets of the trunks or waterways should be above the mean low-water mark."

It is now decided that there has been a taking of the property by the United States, because it is thought that the findings establish that the obstructions placed by the government in the bed of the river at a

point lower down the stream, that is, the plantation, for the purpose of improving the navigation of the river, have so raised the water as to cause it to flow over the embankment at the plantation and flood the same, thus destroying its value. On this subject the court says: "Findings IX and X show that both by seepage and percolation through the embankment and *the actual flowing upon the plantation* above the obstructions the water has been raised in the plantation above eighteen inches," &c. Whilst it is not disputable that the findings show a percolation through the embankment I can discover nothing in them supporting the conclusion that the obstructions placed by the government in the bed of the river below the point where the plantation is situated have caused the water in the river to go over the embankment at the plantation and flood the land. On the contrary, to me it seems that the findings necessitate the conclusion that the permanent damage which the property has suffered arises solely from the fact that the drainage of the plantation into the river has been rendered impossible. And this because the work done by the government has resulted in raising the mean low tide about twelve to fifteen inches, so as to cause the water in the river at mean low tide to be above the point of discharge of the waterways, thus rendering drainage through them no longer possible. There may be a wide legal difference arising from damage consequent on an interference with the drainage of property situated, as this is, by work done by the government in the improvement of navigation, and damage caused by the actual flooding of such property resulting from such work. To determine whether the findings show an actual flowing, or a mere injury to drainage, findings VIII, IX and X need to be considered. Let us see whether they give support to the claim of actual flooding by an overflow of the embankment at the plantation. Finding VIII says:

"VIII. In thus improving navigation of this navigable water the United States has built and maintained and is now building and maintaining in and across the Savannah River, in the bed thereof, certain dams, training walls and other obstructions, obstructing the natural flow of said river in and along its natural bed, and so raising the level of said river above said obstructions, and causing its waters to be kept back and to flow back, and to be elevated above its natural height in its natural bed."

Certainly there is nothing in this finding supporting the inference that the government work has caused the river to overflow the plantation embankment. Finding IX says:

"This rice plantation Vernezobre is above these obstructions. The direct effect thereof is to raise the level of the Savannah River at this plantation, and to keep the point of mean low water above its natural point, so that the outlet of the trunks and waterways above spoken of in the bank of said plantation, instead of being above this point of low-water mark, is now below this point."

Here, then, is the statement that the effect resulting from the government work was simply to raise the mean low-water mark as previously exist-

ing, so as to cause it to cover the waterways which were—as declared by the previous finding—a little less than a foot above the former low-water mark. The finding continues:

"Another direct result was that by seepage and percolation the water rose in the plantation until the water level in the land gradually rose to the height of the increased water level in the river, and the superinduced addition of water in the plantation was about eighteen inches thereby. By reason of this it gradually became difficult, and has now become impossible, to let off the water on this plantation, or to drain the same, so that these acres dedicated to the culture of rice have become boggy, unfit for cultivation, and impossible to be cultivated in rice."

This but declares that because the mean low stage of the water had been raised by the government work so as to cause it to be about eight inches above the mouth of the waterways and to rest against the embankment about eighteen inches, that percolation took place and the drainage was destroyed, the result of the loss of drainage being to render the plantation a bog and no longer suitable for the cultivation of rice. It is submitted nothing in the findings hitherto referred to even intimate that the effect of the work of the government caused the water to flow over the embankment and flood the plantation. On the contrary, the very opposite is the result of the findings.

Let me next consider the tenth finding. It reads as follows:

"By the raising of the level of the Savannah River by these dams and obstructions the water thereof has been backed up against the embankment on the river and has been caused to flow back upon and in this plantation above the obstruction, and has actually invaded said plantation, directly raising the water in said plantation about eighteen inches, which it is impossible to remove from said plantation."

Now, the flowing described here can only relate to the seepage and percolation referred to in the previous finding. The words "above the obstructions" relate not to the embankment on the plantation, but to the obstructions put in the bed of the river by the government below the point where the plantation is situated; and, therefore, what the finding means is that above this obstruction the water is caused to flow back against not over the embankment, as described in the previous finding. And this finding shows besides that it was the impossibility of removing the water which percolated or was the result of rain fall—in other words, the injury to the drainage—which was the cause of the damage.

Thus eliminating all question of the flooding of the land by the overflow of the embankment, the question for decision is this: When a plantation or a portion thereof is situated on the bank of a navigable river, below high-water mark, and because of such situation is dependent for its profitable operation upon drainage into the river at mean low tide, does the United States appropriate the property by the simple fact that in improv-

ing the navigation of the river it raises the mean low tide slightly above the height where it was wont theretofore to be, and by reason of which the drainage of the land below high-water mark is destroyed. It seems to me to state this question is to answer it in the negative. The owner of the land situated below high-water mark acquired no easement or servitude in the bed of the river by the construction of an embankment along the margin of his land at the river below high water, by which he could forever exact that the level of the water within the natural banks of the river could never be changed without his consent, and thus deprive the United States of its control over the improvement of navigable rivers conferred by the Constitution. If damage, by the loss of drainage, into the river at mean low tide of land so situated was caused by the lawful exercise by the United States of its power to improve navigation it was *damnum absque injuria*, and redress must be sought at the hands of Congress and cannot be judicially afforded by a ruling that a damage so resulting constitutes a taking of the property by the United States and creates an implied contract to pay the value of the property. Such a doctrine is directly—as I see it—in conflict with the decisions of this court in *Gibson* v. *United States*, (166 U. S. 269,) and *Scranton* v. *Wheeler*, (179 U. S. 141.) The far-reaching consequence of the doctrine now announced cannot be overestimated.

But even under the hypothesis that the government work caused the land to be overflowed by raising the water above the embankment, I do not conceive that there would be a taking, even in that case, of the property, for a remedy would be easily afforded for any permanent injury to the land by raising the embankment. The quantum of damages would thus not be the value of the property, but the mere cost of increasing the height of the embankment so as to prevent the water from flowing over it. The fact then that a taking is now held to exist, and therefore the United States is compelled to pay the value of the entire property, submits the United States, in the exercise of a power conferred upon it by the Constitution, to a rule which no individual would be subjected to in a controversy between private parties. Nor is this answered by the suggestion that there is a taking because the paying by the United States of the sum of money necessary to raise the level of the embankment so as to prevent the overflow would not compensate the owner, as the property would still be worthless because of the want of drainage. To so suggest is but to admit that the damage complained of results from the inability to drain the land, which, for the reasons already pointed out does not in my opinion constitute a taking.

Indeed, the reasoning hitherto indicated as to the assumed overflow of the embankment is equally apposite to the damage by loss of drainage. For injury to the drainage the remedy would be readily afforded by, if

possible, draining the plantation elsewhere than into the river, or by resort to the pumping appliances necessary to lift out the water accumulating from rainfall or percolation. The cost of doing these things would then be the measure of damages. That a resort to these simple expedients is unavailing as to this particular property because of its being situated below high-water mark does not, I submit, show that the government has taken the property for public use, but simply establishes that the property is so situated that it is subjected to a loss necessarily arising from the fact that it is below high-water mark and therefore absolutely dependent for its drainage on the right of the owner to exact that the mean low tide of the river should be forever unchanged. As the right to so exact does not exist, the loss of drainage does not constitute an appropriation of the property by the United States, and is but the result of the natural situation of the land. If equities exist Congress is alone capable of providing for them.

I am authorized to say that the CHIEF JUSTICE and Mr. Justice HARLAN concur in this dissent.

True copy.

Test:

Clerk Supreme Court, U. S.